82-1671

No. 83-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

ITT CONTINENTAL BAKING CO., INC.,
HOSTESS CAKE DIVISION,

Petitioner,

vs.

BAKERY SALESMEN, DRIVERS,
WAREHOUSEMEN and HELPERS,
LOCAL UNION NO. 51,
affiliated with the
INTERNATIONAL BROTHERHOOD
OF TEAMSTERS, CHAUFFEURS,
WAREHOUSEMEN AND HELPERS
OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

GREGORY J. SCHROEDTER
(Counsel of Record)
ROCKFORD R. CHRASTIL
SARA M. GREEN
BELL, BOYD & LLOYD
Three First National Plaza
70 West Madison Street, Suite 3200
Chicago, Illinois 60602
(312) 372-1121

Attorneys for Petitioner

Dated: April 11, 1983

Merrill/Gunthrop Warren, Chicago • 372-2800

QUESTIONS PRESENTED

IN THE CONTEXT OF MULTIEMPLOYER BARGAINING, WHETHER A UNION MAY PURPOSELY REFRAIN FROM BARGAINING WITH RESPECT TO LOCAL ISSUES AND PRACTICES WHICH ARE NOT UNIFORM THROUGHOUT THE UNIT AND, FOLLOWING EXECUTION OF THE MULTIEMPLOYER AGREEMENT, REQUEST AN ARBITRATOR TO SET TERMS AND CONDITIONS OF EMPLOYMENT APPLICABLE TO SINGLE EMPLOYER MEMBERS THROUGH "POLICY GRIEVANCES"

IF SO, WHETHER THE UNION MAY DO SO IN THE ABSENCE OF A SHOWING OF CLEAR AND UNMISTAKABLE CONTRACT LANGUAGE EVINCING AN ACTUAL AGREEMENT BETWEEN THE PARTIES TO VEST AN ARBITRATOR WITH THE POWER TO ENGAGE IN SUCH INTEREST OR QUASI-LEGISLATIVE ARBITRATION

PARTIES TO THE PROCEEDINGS

Petitioner, ITT Continental Baking Co., Inc., Hostess Cake Division, was the Defendant-Appellee below. Respondent, Bakery Salesmen, Drivers, Warehousemen and Helpers, Local Union No. 51, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, was the Plaintiff-Appellant below.

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Petitioner, ITT Continental Baking Co., Inc., Hostess Cake Division, respectfully prays that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Sixth Circuit, entered in this proceeding on November 1, 1982, and January 19, 1983, respectively.

OPINIONS BELOW

The opinion of the court of appeals is reported at 692 F.2d 29 (6th Cir. 1982) and appears as Appendix A hereto. The decision of the district court is unreported; it appears as Appendix B hereto.

JURISDICTION

The opinion of the court of appeals on the merits was entered on November 1, 1982 (App. A). A timely Petition for Rehearing and Suggestion for Rehearing En Banc was denied on January 11, 1983 (App. C). Judgment was entered on January 19, 1983 (App. D). Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1) (1976).

STATUTORY PROVISION INVOLVED

Section 301(a) of the Labor Management Relations Act of 1947, as amended, 29 U.S.C. §185(a), provides in pertinent part:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

STATEMENT OF THE CASE

At issue in this case is whether an employer's agreement to bargain with a union as a part of a multiemployer bargaining unit permits the union purposely to refrain from bargaining with respect to local practices affecting only individual employer members of the unit and, following execution of the multiemployer agreement, request an arbitrator to set terms and conditions of employment for single employer members through "policy grievances."

1. Factual Background

Bakery Salesmen, Drivers, Warehousemen and Helpers, Local Union No. 51 (hereinafter "the Union"), is a labor organization which represents approximately 100 driver salesmen employed by the Detroit cake plant of the Hostess Cake Division of ITT Continental Baking Company, Inc. (hereinafter "the Company")(App. A 2-3). The Union also represents driver salesmen employed by the Detroit bread plant of the Wonder Bread Division of ITT Continental Baking Company, Inc., and driver salesmen employed by the Detroit plant(s) of American Bakeries, Inc., one of the Company's competitors.

At all times material herein the Company, Continental's Detroit bread plant, and the Detroit plant(s) of American Bakeries, bargained jointly with the Union (App. F 5). The end result of these multiemployer negotiations was a collective bargaining agreement setting forth the wages, hours, and other terms and conditions of employment of the driver-salesmen (App. F 5).

The multiemployer agreement at issue here, signed separately by each employer noted above, including the Company, was effective October 6, 1979, to October 3, 1982 (App. F 16). It contained a grievance-arbitration clause providing in pertinent part as follows (App. F 22-23):

> **ARTICLE XXIII — ARBITRATION**
>
> *Section 1. Grievance Procedure*
>
> a. It is agreed that, should any charge of violation of this Agreement, charge of discrimination, grievance or dispute arise between the parties hereto, such matter must be taken up within ten (10) days of the alleged occurrence or it shall be deemed waived. The parties

shall make an earnest effort to settle such controversy amicably, but if they fail to do so it shall be submitted to arbitration as provided below.

* * *

c. During such proceedings, there shall be no lockout, strike, or stoppage of work and the decision of said neutral party or Arbitrator shall be final and binding upon both parties hereto.

* * *

Section 4. Disputes Over Renewal Agreements

The above mentioned procedure shall not apply to any disputes arising out of negotiations of any subsequent Agreement.

a. The dispute giving rise to arbitration

The Company employs driver salesmen (hereinafter sometimes referred to as "drivers") represented by the Union to deliver its products to retail outlets (App. E 2-3). As part of their duties, driver salesmen are required to collect monies from certain customers along their routes (App. E 3) and to follow a check-in procedure to account for all monetary transactions at the end of the day (App. E 3, 11). Under the Company's check-in procedure, drivers are required to deposit daily, in a Company safe, envelopes containing monies received for delivery of products to customers together with deposit tickets (App. E 3-5, 12). Envelopes are thereafter collected by an armored car service, turned over to the Company's bank, and tallied by employees of the bank (App. E 5, 12). Drivers are required to reimburse the Company for any shortages reported between the contents of their deposit envelopes and their deposit slips (App. E 6). Conversely, drivers are credited with any overages reported (App. E 6).

The Company's check-in procedure and system of collection described above has been in existence for eighteen to twenty-one years (App. E 2, 12). In the several years prior to negotiation of the 1979 multiemployer bargaining agreement, the Union filed a number of grievances alleging that drivers had been incorrectly charged with shortages due to bank error or misplacement of envelopes after their removal from the safe (App. E 7, 12-13).[1] The Union met with Company representatives on several occasions in the course of processing these grievances for the purpose of discussing a modification in the Company's check-in procedure (App. F 6-8). The Company declined to agree to any modification in these discussions (App. E 15).

Thereafter, during the 1979 multiemployer negotiations, the Union presented no contract proposals seeking to modify the Company's check-in procedure (App. F 5-9, 14-15). On February 6, 1980, four months following the effective date of the 1979-1982 bargaining agreement, the Union filed a "policy grievance" against the Company seeking to alter the established check-in procedure (App. E 6-7). The Union's grievance sought an award requiring the Company to assign a representative to tally the funds contained in each driver's envelope, and to verify the same either by issuing a receipt or initialing the driver's daily cash and check record (App. E 11).

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[1] Those grievances were limited to challenging application of the check-in procedure in individual cases and were not directed to challenging the Company's right to adhere to such procedure and practice as an established term and condition of employment (App. E 7, 12-13). Indeed, in the settlement of a grievance entered into between the Company and the Union in May, 1977, it was expressly agreed that the Company maintained the right to adhere to the money check-in procedure and to require drivers to accept responsibility for properly recording and depositing monies collected by them (App. E 12-14; App. F 11-14, 24-28).

b. The arbitrator's award

The Union demanded that an arbitrator be selected to hear and decide its "policy grievance." Pursuant to the parties' 1979-1982 collective bargaining agreement, an arbitrator was selected and a hearing was scheduled for November 20, 1980 (App. F 1). At the arbitration hearing, the Company contested the arbitrability of the Union's "policy grievance" (App. F 2).

In an award dated March 13, 1981, the arbitrator found that the Company's check-in procedure "had been in effect and had remained unchallenged for at least as long as twenty-one years", and that the Union "had never attempted to. . . effect a change in the existing procedure at the bargaining table" (App. E 15). In these circumstances, the arbitrator acknowledged that the grievance was "in the nature of an interest dispute" (App. E 9, 15); that is, the Union sought to effectuate a totally new check-in procedure or method of operation through arbitration rather than through collective bargaining. He nevertheless found the relief requested by the Union within his power to grant because the Union did not

seek to excise a written contract term, but rather sought to alter a term and condition of employment "not covered" by the agreement (App. E 8-9).[2]

2. Proceedings Below

The Union commenced this action in the United States District Court for the Eastern District of Michigan pursuant to Section 301(a) of the Labor Management Relations Act of 1947, as amended, 29 J.S.C. §185(a), seeking to enforce the arbitration award. The district court dismissed the suit. In pertinent part the court concluded that the traditional rights arbitration clause contained in the parties' collective bargaining agreement did not authorize the arbitrator to engage in the extraordinary tactic of "interest arbitration," thereby altering an established Company procedure and practice

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[2] In pertinent part, the award provided (App. E 19-20):

I.

The check-in procedure relating to driver salesmen at the two distribution centers (Troy and Livonia, Michigan) shall be modified so as to require that a representative of management be present during times that driver salesmen check in, and be required to count the contents of their envelopes, and compare same with the amounts recorded on the daily settlement sheet;

II.

After such verification, the driver salesman shall be issued a receipt for the contents of the envelope, or, such verification may be noted on the driver's "pink slip" by affixing the date, and initials of the person making the verification;

* * * *

IV.

The Arbitrator will retain jurisdiction for a period of six (6) months from date of this Award; either party may, prior to the expiration of said six-month period make a written request for reconsideration, review, or modification of the foregoing Award;

V.

In event such request is filed, the Arbitrator will consider in addition to the evidence heretofore presented such new evidence as relates to the operation of the check-in procedure pursuant to this Award.

applicable to unit employees and substituting a new procedure and practice in derogation of the traditional collective bargaining process (App. B 5, 6-7).

On appeal, a panel of the Sixth Circuit Court of Appeals rejected the district court's analysis. In the Sixth Circuit's view, grievances pressed under a multiemployer contract against a single unit employer raise "local disputes" which "need to be resolved by arbitration since the issues are unlikely to be addressed at the bargaining table" (App. A 8). In these circumstances, the Court adopted an eight-prong test to determine whether an arbitration clause includes a dispute concerning company policy in the context of a multiemployer contract. That test turns on the application of the following eight factors (App. A 8-9):

> (1) the language of the arbitration clause; (2) the language of the no-strike clause; (3) the language of any management rights clause; (4) how directly the company policy in question affects employee working conditions and morale; (5) how directly the policy affects the company's profit structure and stockholders; (6) whether the dispute in question is industry-wide or limited to one employer; (7) the course of any contract negotiations concerning the disputed policy; and (8) whether any substantive provisions of the contract tend to support or negate the policy in question.

Applying these factors to the instant proceeding, the court concluded that the arbitration clause properly vested the arbitrator with authority to alter the Company's check-in procedure, thereby permitting the arbitrator to assume the responsibility for managing the Company's operations with respect to its money collection system (App. A 9).

REASONS FOR GRANTING THE WRIT

"Multiemployer bargaining has continued to be the preferred bargaining mechanism in many industries, and as *Buffalo Linen* predicted, it has raised a variety of problems requiring resolution." *Charles D. Bonanno Linen Service v. NLRB*, 454 U.S. 404, 410 (1982). In *Bonanno Linen*, the problem requiring resolution was the rights of unions and employers to terminate the multiemployer bargaining arrangement. Here, the problem requiring resolution is no less critical and concerns the duty to bargain vis-a-vis the duty to arbitrate with respect to local issues arising in the multiemployer bargaining context. As noted, the decision below set forth an eight factor test for deciding when an arbitration clause encompasses a dispute concerning a company policy in the multiemployer context. This eight factor test allows an arbitrator to ignore the role and function of past practice in the administration of collective bargaining agreements, contrary to the mandate of the *Steelworkers Trilogy*;[3] it allows an arbitrator to "dispense his own brand of industrial justice" (*Steelworkers v. Enterprise Wheel*, 363 U.S. at 597) and force upon an employer a mid-term contract change without the employer's consent, contrary to the *Steelworkers Trilogy* and the express provisions of the National Labor Relations Act; and it undermines the utility of multiemployer bargaining as an instrument of labor peace.

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[3] *United Steelworkers of America v. American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers of America v. Warrior and Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers of America v. Enterprise Wheel and Car Corp.*, 363 U.S. 593 (1960).

I. THE DECISION BELOW SETS FORTH A NEW TEST FOR THE ARBITRATION OF LOCAL DISPUTES UNDER A MULTIEMPLOYER AGREEMENT THAT IS CONTRARY TO THE *STEELWORKERS TRILOGY* AND THE EXPRESS PROVISIONS OF THE NATIONAL LABOR RELATIONS ACT

Past practice plays a significant role in the administration of the collective bargaining agreement. As Justice Douglas stated in *Steelworkers v. Warrior and Gulf*, 363 U.S. at 581-582:

> The labor arbitrator's source of law is not confined to the express provisions of the contract, as the industrial common law — the past practices of the industry and the shop — is equally a part of the collective bargaining agreement although not expressed in it.

Ever since *Warrior and Gulf*, past practice has become one of the most useful and hence one of the most commonly used aids in resolving grievance disputes. It can help the arbitrator in a variety of ways in interpreting the agreement. It may be used to clarify what is ambiguous, and/or give substance to what is general. It may also, apart from any basis in the agreement, be used to establish a separate, enforceable condition of employment.

The reason that past practice often constitutes a separate, enforceable condition of employment is that the parties cannot set down on paper the whole of their agreement. "One cannot reduce all the rules governing a community like an industrial plant to fifteen or even fifty pages." Cox, *Reflections Upon Labor Arbitration*, 72 HARV. L. REV. 1482, 1499 (1959); *quoted with approval in Steelworkers v. Warrior and Gulf*, 363 U.S. at 579 n. 6.

Thus, a collective bargaining agreement includes not just the written provisions stated therein; it also includes the understandings and mutually accepted practices which have developed over the years.[4] Because the contract is executed in the context of these understandings and practices, the negotiators must be presumed to be fully aware of them and to have relied upon them in striking their bargain. Hence, if a particular practice is not repudiated during negotiations, it may fairly be said that the contract was entered into upon the assumption that the practice would continue in force. By

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[4] In a paper delivered at the ninth annual meeting of the National Academy of Arbitrators held in Cleveland, Ohio on January 26-28, 1956, Arthur J. Goldberg, then General Counsel, United Steelworkers of America, stated:

> The real question that arises is, what is the deal? Is it the contract or something more? I cannot agree that the deal includes the acceptance of the pre-union past as a guide for the future. But the practices which grow up during decades of a collective bargaining relationship cannot be swept aside. They have weight which must be measured in the specific case in the light of many factors. These practices, grievance settlements, understandings, etc., inevitably represent the set of circumstances which formed the back drop of the negotiation of the current agreement. Since every matter involving wages, hours, and working conditions is a matter to be determined by collective bargaining — and if this is not so then just what is collective bargaining? — then it is reasonable to assume that the contract is made in the light of the present circumstances. To the extent that present conditions and methods for change are not revised, they are accepted.

Goldberg, *Management's Reserved Rights: A Labor View*, in MANAGEMENT RIGHTS AND THE ARBITRATION PROCESS, PROCEEDINGS OF THE NINTH ANNUAL MEETING OF THE NATIONAL ACADEMY OF ARBITRATORS 118, 126 (1956).

their silence, the parties have given assent to "existing modes of procedure."[5] In this way, practices become an integral part of the contract.[6]

The decision of the court below, however, freely sanctions arbitrators to ignore the common law of the shop in the administration of collective bargaining agreements entered

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[5] Brown, *Management Rights and the Collective Agreement*, in PROCEEDINGS OF THE FIRST ANNUAL MEETING OF THE INDUSTRIAL RELATIONS RESEARCH ASSOCIATION 145, 155 (1949). Brown expressed his analysis in these words:

> But when all of the provisions are written, it will be found that many matters which affect conditions of employment are not specifically referred to. Does this mean that these matters are of no concern to the parties, or that the agreement has no meaning with respect to them? I think not. On some of these matters, the parties are satisfied with existing modes of procedure, consciously or unconsciously. On others, one party or the other may be dissatisfied but may be unable to devise better modes. On still others, one party may have preferred an alternative but may have been unable to secure agreement from the other party, or may have been unwilling to pay the price necessary for acceptance. In any event, the omission of specific reference is significant.
>
> [T]he agreement, no matter how short, does provide a guide to modes of procedure and to the rights of the parties on all matters affecting the conditions of employment. Where explicit provisions are made, the question is relatively simple. But even where the agreement is silent, the parties have, by their silence, given assent to a continuation of the existing modes of procedure.

[6] Cox not only agrees with this view but states it more strongly. In asserting that the words of the contract cannot be the exclusive source of rights and duties, he emphasizes the following point:

> Within the sphere of collective bargaining, the institutional characteristics and the governmental nature of the collective bargaining process demand a common law of the shop which implements and furnishes the context of the agreement. We must assume that intelligent negotiators acknowledged so plain a need unless they stated a contrary rule in plain words.

Cox, *supra* p. 10, at 1499.

The common law of the shop would include, at the very least, long-standing practices in the plant.

into in the context of multiemployer bargaining. In the court's view, disputes over the continued application of local shop practices — those applicable only to individual employer members of the multiemployer unit — are not subject to resolution through multiemployer bargaining. Accordingly, in the context of multiemployer bargaining, an agreement to arbitrate vests an arbitrator with the power to ignore established past practice and alter existing local procedures and practices during the term of the contract. In other words, in the absence of a written contract provision establishing the rights and obligations of the parties with respect to local practices, the court concluded that peaceful resolution of labor disputes requires that "interest arbitration" be substituted for the process of collective bargaining.

It is apparent that the court's decision undermines the role and function of past practice in labor arbitration. Of even more concern, the decision vests arbitrators in private proceedings with power to modify or change company procedures and practices affecting conditions of employment which have never been the subject of collective bargaining. Such a result directly contravenes national labor policy as set forth in the National Labor Relations Act; and is nowhere sanctioned by the decisions of this Court in the *Steelworkers Trilogy*.

A. The decision below contravenes national labor policy

The statutory right and obligation of employers and unions to bargain collectively is protected by the National Labor Relations Act (NLRA)[7] and lies at the heart of national

[7] 29 U.S.C. §151 et seq. See specifically sections 8(a)(5) and 8(b)(3) of the NLRA, 29 U.S.C. §§ 158(a)(5) and (b)(3) respectively.

policy governing labor management relations. The obligation to bargain, however, does not include the obligation to agree. Section 8(d) of the NLRA, 29 U.S.C. §158(d), provides:

> [T]o bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, *but such obligation does not compel either party to agree to a proposal or require the making of a concession.* (emphasis added).

In accordance with these fundamental principles, it is well settled that both employers and unions alike violate the duty to bargain where they seek unilaterally to impose changes in established terms and conditions of employment, including long-standing procedures and practices, during the term of an

existing contract.[8] Further, the duty to bargain is *not* satisfied by the parties' submission of the dispute to arbitration.[9] On the contrary, arbitration of grievances is a procedure distinct from collective bargaining and an arbitrator has no

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[8] *Alfred M. Lewis, Inc. v. NLRB*, 587 F.2d 403, 408-409 (9th Cir. 1978) (employer violated 8(a)(5) by instituting new production quotas and a new disciplinary system without bargaining); *NLRB v. Miller Brewing Co.*, 408 F.2d 12, 14-16 (9th Cir. 1976); *Boland Marine & Mfg. Co.*, 225 N.L.R.B. 824 (1976); *General Electric Co.*, 192 N.L.R.B. 68, 72 (1971), *enforced*, 466 F.2d 1177 (6th Cir. 1972); *Murphy Diesel Co.*, 184 N.L.R.B. 756 (1970), *enforced*, 454 F.2d 303,304, 307 (7th Cir. 1971); *Dunham-Bush, Inc.*, 264 N.L.R.B. No. 175, 111 L.R.R.M. 1389, 1390 n. 4 (1982); *NLRB v. System Council, T-6, IBEW*, 599 F.2d 5, 6-8 (1st Cir. 1979) (union violated 8(b)(3) by unilaterally adopting an internal union rule in derogation of existing shop practice recognized by parties' contract); *Norwalk Typographical Union No. 529*, 241 N.L.R.B. 310, 313-315 (1979).

See generally NLRB v. Katz, 369 U.S. 736, 743 (1962) (employer violates 8(a)(5) when, absent union waiver, it changes employees' terms and conditions of employment without giving the union an opportunity to bargain about the change); *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 209-210 (1964).

[9] *Alfred M. Lewis, Inc. v. NLRB*, 587 F.2d at 408; *Aluminum Co. of America v. UAW*, 630 F.2d 1340, 1344 (9th Cir. 1980).

jurisdiction to resolve for the parties those issues that are required by statute to be resolved through the process of collective bargaining.[10]

The decision of the court below, however, permits an arbitrator acting under a multiemployer bargaining agreement to resolve for the parties local issues that are required by statute to be resolved through the process of collective bargaining. Such a fundamental encroachment of an employer's statutory right to bargain finds no justification in national labor policy respecting multiemployer bargaining.

A multiemployer unit is created upon the mutual consent of a union and a group of employers to be bound in future collective bargaining through group rather than individual bargaining. *Weyerhaeuser Co.*, 166 N.L.R.B. 299 (1967), *enforced*, 398 F.2d 770 (D.C. Cir. 1968), *cited with approval* in *Bonanno Linen*, 454 U.S. at 420 (concurring opinion of Justice Stevens). Upon formation of a multiemployer unit,

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[10] It is well settled that the NLRB retains independent jurisdiction to remedy unfair labor practices and that the NLRB's ruling takes precedence in the event of irreconcilable conflict with the terms of an arbitrator's award. *Carey v. Westinghouse Electric Corp.*, 375 U.S. 261, 271-272 (1964); *NLRB v. Strong*, 393 U.S. 357, 360-361 (1969); *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 438 (1967).

Accordingly, while the NLRB may, in the exercise of its jurisdiction, defer to an arbitrator's award, it is not required to do so and will not do so where the award is "clearly repugnant" to the purposes and policies of the Act. *Spielberg Manufacturing Co.*, 112 N.L.R.B. 1080, 1082 (1955), *cited with approval* in *NLRB v. Plasterers' Local No. 79*, 404 U.S. 116, 136-137 (1971); *NLRB v. South Central Bell Telephone Co.*, 688 F.2d 345, 350 (5th Cir. 1982).

In accordance with these principles, the NLRB will not defer to arbitral awards upholding an employer's unilateral promulgation of policies and work rules where the statute requires such issues to be resolved by collective bargaining. *See, e.g., CIBA-Geigy Pharmaceuticals*, 264 N.L.R.B. No. 134, 111 L.R.R.M. 1460, 1461 (1982); *Alfred M. Lewis, Inc. v. NLRB*, 587 F.2d at 407-408.

the same rights and obligations attach to an employer member of the collective unit as attach to a single employer under the NLRA. This includes the right and obligation to bargain over all mandatory subjects of bargaining.[11]

Admittedly, the National Labor Relations Board (NLRB) has long recognized the exigencies of multiemployer bargaining. Thus, the NLRB early noted that the interests and problems of employers who consent to be bound in multiemployer bargaining are not uniform throughout the unit, and that resolution of local issues may not be possible in multiemployer negotiations.[12] However, the practicalities of multiemployer bargaining do *not* affect the statutory right of employers to resolve local issues through collective bargaining. On the contrary, the statute *requires* collective bargaining with respect to local issues that are not raised in multiemployer negotiations.[13] To that end, the NLRB has long sanctioned individual bargaining between unions and individual employer members of the unit with respect to local issues and has held such individual bargaining fully consistent with the duty to bargain in a multiemployer unit.[14]

In derogation of an employer's statutory rights, the test adopted by the court below on its face sanctions the use of arbitration under multiemployer bargaining agreements in a manner which is contrary to the NLRA. To repeat, the decision encroaches on an employer's statutory right to resolve

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[11] *NLRB v. Miller Brewing Co.*, 408 F.2d at 14-16; *see generally NLRB v. Strong*, 393 U.S. 357 (1969).

[12] *Kroger Co.*, 148 N.L.R.B. 569 (1964).

[13] *NLRB v. Miller Brewing Co.*, 408 F.2d at 14-16 (under 8(a)(5) individual employer member of multiemployer bargaining unit obligated to bargain with union over issuance of new local plant rules following negotiation of multiemployer agreement which made no provision for issuance of plant rules).

[14] *Kroger Co.*, 148 N.L.R.B. at 573.

local issues through the process of collective bargaining contrary to rights guaranteed by Section 8(b)(3) of the NLRA.[15] Further, the decision grants arbitrators an unlimited power to compel agreement on local issues, contrary to the statutory mandate contained in Section 8(d) of the NLRA that the obligation to bargain "does not compel either party to agree to a proposal or require the making of a concession."[16] For these reasons alone, the decision should not be permitted to stand.

B. The decision below creates a loophole in Section 10(a) of the NLRA that renders private resolution of unfair labor practices insulated from scrutiny by the NLRB

Section 10(a) of the NLRA, 29 U.S.C. § 160(a), declares in relevant part:

> The Board is empowered...to prevent any person from engaging in any unfair labor practices.... This power shall not be affected by

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[15] Indeed, as the District Court observed (App. B 7):

> The interpretation given by the arbitrator would result in the company being subject to binding arbitration on every management decision that was not expressly covered by the contract and which the union sought to modify. The only way that management could establish policy would be to specifically include it in the agreement, otherwise the policy would be subject to an arbitrable decision on whether it was "fair, reasonable and practical" to modify it if so requested by the union. *To receive this benefit all the union would need do is refrain from bargaining or negotiating regarding the policy. It seems to us that this is contrary to the collective bargaining process.* (emphasis added).

[16] Indeed, as this Court has recognized, not even the NLRB — acting in furtherance of its superior statutory authority to prevent the commission of unfair labor practices — retains power to dictate what terms and conditions of employment should be contained in the parties' labor agreement. *H. K. Porter v. NLRB*, 397 U.S. 99 (1970); *See also NLRB v. C & C Plywood Corp.*, 385 U.S. 421 (1967).

> any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise.

In accordance with Section 10(a), it is well settled that the jurisdiction of an arbitrator to enforce private contract rights cannot defeat the jurisdiction of the NLRB to enforce public statutory rights.[17]

In *Carey* v. *Westinghouse*, this Court considered the proper accommodation to be reached under conflicting labor policies when a dispute arguably within the jurisdiction of an arbitrator's authority presents a dispute equally cognizable by the NLRB as an unfair labor practice. The Court held that Section 10(a) of the NLRA need not preclude submission by a union of a dispute to arbitration in such circumstances because the "superior authority of the [NLRB may] be invoked at anytime" by an employer to redress a violation of statutory rights and because the NLRB's ruling "would, of course, take precedence" in the event of irreconcilable conflict with the terms of an arbitrator's award. 375 U.S. at 272.

For this reason, it is well settled that a union retains a separate and independent right to invoke the jurisdiction of the NLRB to challenge an employer's unilateral changes in mandatory subjects of bargaining upheld by the terms of an arbitrator's award. An employer may *not* avoid an unfair labor practice charge by claiming that the parties have agreed to submit to the terms of a final and binding arbitration award. As explained by the Ninth Circuit, it would "wholly undercut the duty to bargain if the employer were allowed to act with reference to a mandatory bargaining subject and then simply defend its actions in an arbitration hearing." *Alfred M. Lewis v. NLRB*, 587 F.2d at 408.

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[17] *Carey v. Westinghouse Electric Corp.*, 375 U.S. at 271-272; *See also NLRB v. South Central Bell Telephone Co.*, 688 F.2d at 349-350.

Unions stand, however, in a fundamentally different posture from employers with respect to setting terms and conditions of employment applicable to unit employees. While an employer — who provides employment and directs the workforce — possesses the inherent power unilaterally to set working conditions, a union retains no such inherent power. Rather, the statute secures to unions the right to bargain to improve those conditions; the right to exercise their economic strength through strikes or picketing in support of their bargaining demands; and the right to enforce any agreement incorporated in a written contract.

In the instant proceeding, the Union never attempted to secure alteration of a Company procedure and practice of twenty-one years' duration through the exercise of its statutory rights. It therefore decided to utilize the putative contract power of an arbitrator to compel the Company's agreement to a new check-in procedure.[18] The arbitrator ordered promulgation of a new check-in procedure, which the Union then sought to enforce by means of a Section 301 suit.

In these circumstances, an employer's ability to challenge such action as an unfair labor practice is uncertain. The NLRB has consistently held that, despite the coercive effect on statutory rights, the mere filing of a civil suit cannot be found to be an unfair labor practice. *Glaziers and Glassworkers Local Union 767 (Sierra Glass Service, Inc.)*, 228 N.L.R.B. 35, 41 (1977), *enforced*, 577 F.2d 100, 103 (9th Cir. 1978), and cases cited therein. The rationale for such holdings was set forth in *Clyde Taylor*, 127 N.L.R.B. 103, 109 (1960), wherein the NLRB stated that it "should accommodate its enforcement of the NLRA to the right of all persons to litigate

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[18] The Union had no inherent power unilaterally to order this change. Accordingly, in sharp contrast to an employer, the Union here did not act first and defend its actions later through arbitration.

their claims in court, rather than condemn the exercise of such right as an unfair labor practice." In accordance with the rationale set forth in *Clyde Taylor*, the NLRB has declined to hold that a suit to confirm an arbitrator's award or to compel arbitration may be the subject of an unfair labor practice. *E.g.*, *Retail Clerks Union, Local 770*, 218 N.L.R.B. 680, 682-683 (1975); *Smith Steel Workers (A.O. Smith Co.)*, 174 N.L.R.B. 235, 241, *enforced in relevant part*, 420 F.2d 1, 9 (7th Cir. 1969). *But see Sperry Systems Management Division v. NLRB*, 402 F.2d 63 *(2d Cir. 1974)*.

The decision of the court below permits a union to secure a change in established terms and conditions of employment in the context of multiemployer bargaining without complying with the statutory duty to collectively bargain over such change. Because the decision permits the union to obtain such a change through arbitration and civil suit, it is questionable whether the union's conduct states an unfair labor practice cognizable by the NLRB under its current policy. In these circumstances, if the court's decision is permitted to stand, an arbitrator may well be vested with final authority to sanction unfair labor practices contrary to the express terms of Section 10(a) of the NLRA. This Court should not permit the lower court to adopt a test which allows unions to act in derogation of an employer's statutory right to bargain and at the same time to escape review of its conduct by the NLRB under the provisions of the NLRA.

C. The decision below finds no support in the *Steelworkers Trilogy*

Private settlement of labor disputes by a method agreed upon by the parties similarly lies at the heart of national policy governing labor management relations. Specifically, in the *Steelworkers Trilogy*, this Court endorsed arbitration as a forum — independent and additional to the NLRB — in

which to seek redress of labor disputes. The Court observed, however, that an arbitrator's authority and power to resolve private contract disputes must accord with the fundamental aims of national labor policy. In the Court's view, that policy lies in Section 203(d) of the Labor Management Relations Act of 1947, as amended, 29 U.S.C. § 173(d). That section provides:

> Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes *arising over the application or interpretation of an existing collective bargaining agreement.* (emphasis added).

Nowhere in the *Steelworkers Trilogy* did the Court hold, nor did it suggest, that execution of an agreement to arbitrate contract labor disputes vests arbitrators in private proceedings with power to compel agreement to conditions of employment which have never been the subject of collective bargaining and which is otherwise contrary to national labor policy. Indeed, the Court cautioned that an arbitrator's function is confined to an interpretation and application of the collective bargaining agreement. 363 U.S. at 597. Further, his source of law is both defined and delimited by the express provisions of the contract and the practices of the shop which are "equally a part of the collective bargaining agreement although not expressed in it." 363 U.S. at 581-582. Finally, his award is legitimate only so long as it "draws its essence" from such contract provisions and shop practices; "he does not sit to dispense his own brand of industrial justice." 363 U.S. at 597.

The decision below freely sanctions arbitrators who rule on contract disputes in the context of multiemployer collective bargaining agreements to modify or change procedures or practices of individual employer members of the unit based

on the arbitrator's "own brand of industrial justice." This is strikingly apparent on the facts of the instant proceeding. The arbitrator acknowledged, and the court below accepted his findings, that the Company's procedure and practice respecting the reporting of funds by drivers had been in effect for eighteen to twenty-one years and had never been altered through mutual agreement of the parties. Moreover, the very terms of the award reveal that the arbitrator's promulgation of a new check-in procedure in no wise reflected an agreement of the parties.[19]

The *Steelworkers Trilogy* was not intended to permit the displacement of the critical role played by collective bargaining in the formation of contract terms and local practices which define the terms and conditions of employment applicable to unit employees. As noted above, no justification exists to expand the role of arbitration, as defined in the

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[19] In this regard, even the arbitrator noted several potential problems in the operation of the new check-in procedure. First, "additional time may be involved in recounting the contents of the envelopes, estimated at some six minutes for each driver salesman, for approximately forty employees at each of the two distribution centers." He further noted that the added time would form an "additional burden in the form of 'waiting time' assumed by driver salesmen"; however, he presumed that no additional compensation would be required to be paid to driver salesmen inasmuch as they are paid on a commission basis only. In these circumstances, the arbitrator speculated that the Company's additional cost "would be limited to the services of one, or more Company representatives during the period required to verify the contents of the envelopes" (App. E 16).

The arbitrator's observations constitute a tacit recognition that such problems are appropriately resolved through collective bargaining rather than through arbitration. Here, the arbitrator acted unguided by any agreed-upon standards to be applied in determining local terms and conditions of employment. In place of such agreed-upon standards, he substituted a general standard of "fairness and equity." To permit an arbitrator to exercise power to determine local terms and conditions of employment where he lacks understanding and sympathy for major decisions concerning the workplace serves to aggravate rather than to diminish peaceful resolution of labor disputes. See *infra* 29.

Steelworkers Trilogy, merely because the union has negotiated with the employer as part of a multiemployer bargaining unit. Indeed, such a result is repugnant to the purpose and policy of the NLRA.

II. AN ARBITRATOR IS WITHOUT POWER TO ORDER CHANGES IN MANDATORY SUBJECTS OF BARGAINING ABSENT CLEAR AND UNMISTAKABLE CONTRACT LANGUAGE

In the instant case the arbitrator found, and the court did not reject his finding, that the Union's policy grievance was "in the nature of an interest dispute" (App. E 9). That is, the Union sought to delegate to an arbitrator the power to alter a long-standing Company procedure and practice that is "equally a part of the agreement though not expressed in it." 363 U.S. at 581-582.

Under a scheme of true interest arbitration, the parties delegate to an outsider the final decision on what terms their contract will contain. *NLRB v. Columbus Printing Pressmen & Assistants' Union No. 252*, 543 F.2d 1161, 1169 (5th Cir. 1976).[20] Thus, interest arbitration delegates power to an arbitrator to legislate contract terms, not merely to adjudicate rights under existing contract terms. As such, interest arbitration effects a profound change in the nature of collective bargaining contemplated under the NLRA, for the parties agree to substitute the decision of an arbitrator for "the precise bargain the parties would have struck had the parties' economic power been exerted against each other." As the Fifth Circuit has observed:[21]

> This situation runs counter to a basic premise of the [NLRA] — that the cause of industrial

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[20] Typically, interest arbitration is limited to resolving disputes arising over the renegotiation of contracts, it is not invoked during the term of an existing contract to modify terms and conditions of employment.

[21] *NLRB v. Columbus Printing Pressmen*, 543 F.2d at 1170.

> peace is best served when 'the balance of bargaining advantage [is] set by economic power realities.' *NLRB v. Burns International Security Services, Inc.*, 406 U.S. 272, 92 S. Ct. 1571, 1582, 32 L.Ed.2d 61, 73 (1972).

It is true that interest arbitration agreements are not wholly unenforceable. Parties *may* agree to interest arbitration where they think it is mutually advantageous and, where such agreement exists, the parties are entitled to enforce arbitration to resolve contract terms involving mandatory subjects of bargaining.[22] However, an agreement to engage in interest arbitration is, in the truest sense, an agreement to waive the statutorily protected right to resolve contract terms involving mandatory subjects of bargaining through the process of collective bargaining. The NLRB has long held that a waiver of statutory rights is not to be lightly imputed.[23] Rather, because a provision protecting a statutory right "would normally be implied in an agreement by operation of the [NLRA] itself," that protection is waived only by "clear and unmistakable" contract language. *NLRB v. Perkins Machine Co.*, 326 F.2d 488, 489 (1st Cir. 1964); *Metropolitan Edison Co.* v. *NLRB*, — U.S. —, No. 81-1664 (April 4, 1983), No. 65 Daily Labor Reports (BNA), D-1, D-5, and cases cited in n. 12 therein (April 4, 1983).

As noted, *supra*, attempts to invoke grievance-arbitration machinery to secure unilateral changes in past practices during the life of an existing contract are violative of the NLRA.[24]

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[22] *See, e.g., NLRB v. Columbus Printing Pressmen*, 543 F.2d at 1171; *Sheet Metal Workers Int'l Ass'n, Local 252 v. Standard Sheet Metal, Inc.*, 699 F.2d 481, 483 (9th Cir. 1983).

[23] *See, e.g., Smith Cabinet Mfg. Co.*, 147 N.L.R.B. 1506, 1507-1508, n. 2 (1964); *NLRB v. Everbrite Electric Signs, Inc.*, 562 F.2d 405, 407-408 (7th Cir. 1977).

[24] See cases cited *supra*, n. 10.

Stated otherwise, the mere existence of a standard grievance-arbitration provision does not constitute a clear and unambiguous agreement to waive the statutorily protected right to bargain, and to commit to the authority of an arbitrator the power to determine what changes should be effected in mandatory subjects of bargaining.

The arbitrator below found that interest disputes were within his power to resolve under contract language providing for arbitration of "any charge of violation of this Agreement, charge of discrimination, grievance or disputes [which] arise between the parties hereto...." The court below endorsed the arbitrator's finding based on its view that — in the context of multiemployer bargaining — disputes affecting only a single unit employer raise local issues that "need to be resolved by arbitration since the issues are unlikely to be addressed at the bargaining table" (App. A 8).

The perceived practicalities of multiemployer bargaining are no substitute for a court's duty, under the *Trilogy*, to examine whether the parties agreed to submit the dispute to arbitration. See *Steelworkers v. Warrior & Gulf*, 363 U.S. at 582. In the instant case neither the contract language nor the record below supports a finding that the parties have agreed to invest an arbitrator with power to engage in interest arbitration. Indeed, the parties have expressly agreed that no arbitrator shall have the power to make changes in terms and conditions of employment for the parties at the time when such issues normally and routinely arise — at the conclusion

of the contract term.[25] In the absence of a clear and unmistakable agreement of the parties to engage in interest arbitration, this Court should not sanction the adoption of a test which commits employers to waive their statutory right to resolve local issues through collective bargaining merely because they have agreed to be bound by a multiemployer collective bargaining agreement.

III. The Decision Below Undermines the Utility of Multiemployer Bargaining as an Instrument of Labor Peace

Multiemployer bargaining continues "to be the preferred bargaining mechanism in many industries," and is "a vital factor in the effectuation of the national policy of promoting labor peace through strengthened collective bargaining."[26] Multiemployer bargaining promotes labor peace by encouraging "both sides to adopt a flexible attitude during negotiations;" it also enhances the efficiency and effectiveness of the collective bargaining process by permitting the union and employers to concentrate their bargaining resources on the negotiation of a single contract.[27]

It is apparent that the decision below jeopardizes labor peace, as well as the efficiency and effectiveness of multiemployer bargaining. As the district court stated (App. B 7):

> The only way that management could establish policy would be to specifically include it in the agreement, otherwise the policy would be

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[25] Thus, the agreement expressly excluded from arbitration "any disputes arising out of negotiations of any subsequent agreement" (App. F 23). Moreover, the parties have always resolved disputes identical in all material respects to the one herein through the process of collective bargaining and not through the grievance and arbitration procedure (App. G 1-3).

[26] *Bonanno Linen Service*, 454 U.S. at 410.

[27] *Id.* at 409 n.3, *quoting NLRB v. Charles D. Bonanno Linen Service, Inc.*, 630 F.2d 25, 28 (1st Cir. 1980).

> subject to an arbitrable decision on whether it was "fair, reasonable and practical" to modify it if so requested by the union. *To receive this benefit all the union would need to do is refrain from bargaining or negotiating regarding the policy. It seems to us that this is contrary to the collective bargaining process.* (emphasis added).

To avoid the result so aptly observed by the district court, a single employer member of a multiemployer group would be required to inject local issues into the joint negotiations. However, this action by the single employer would expand the scope of negotiations without any corresponding benefit that serves either the interests of the union or those of the employer members as a whole. As one commentator has observed, the net effect of injecting joint bargaining with considerable time and effort to settle a problem of one employer or a small group "can be a work rule limiting every company instead of solving the problem for one." WM. CHERNICH, COALITION BARGAINING 10 (1969).

The court below recognized that injecting local issues into multiemployer negotiations is not appropriate, and is indeed contrary to national labor policy.[28] The solution, as already

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[28] In the court's view a union has a legitimate interest in seeking to challenge local policies among those employers with whom it has a dispute without simultaneously being required to challenge that policy among other local employers as to whom represented employees have voiced no complaint. The court quoted with approval the following statement contained in the Union's supplemental brief (App. A 8):

> The exigencies of reaching a settlement will discourage either side from making proposals that are of particular interest to only one employer or to one group of employees. Because problems with this work rule have arisen only at Hostess Cake and employees at other companies might not want their check-in procedure changed, the 'milieu' [citation omitted] in which this contract was negotiated clearly supports the arbitrator's determination that the policy grievance was arbitrable.

In these circumstances, the court concluded that "the policy favoring arbitration espoused in the *Steelworker Trilogy* applies with even greater force in situations involving local disputes governed by multi-employer agreements." *Id.*

demonstrated, *supra*, is individual bargaining either before, during or after the multiemployer negotiations. The solution *is not*, as the court below held, interest arbitration in lieu of any bargaining at all.

Interest arbitration in lieu of bargaining is untenable for the reason that there are "serious limits in the industrial relations arena to the effectiveness of legally imposed terms of employment."[29] A singular danger in substituting the arbitral forum for the bargaining table lies in the "resentment that would arise among workers and employers through [an arbitrator's] lack of understanding and sympathy for major decisions concerning the workplace."[30] That danger is greatly magnified where doubt exists as to whether the parties voluntarily agreed to invest a third party with power to impose terms of employment. "The result is that a party's dissatisfaction with an award may be aggravated by doubts about its legitimacy."[31]

The Company here agreed to participate in bargaining on a multiemployer basis. As part of that Agreement, the Company was bound by a standard grievance-arbitration clause to submit disputes over interpretation and application of the agreement to arbitration. As demonstrated, the fact that the check-in procedure was not reduced to writing and incorporated into the contract did *not* constitute a waiver of the

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[29] D. BOK AND J. DUNLOP, LABOR AND THE AMERICAN COMMUNITY 238 (1970).

[30] *Id.* Indeed, as Professor Archibald Cox has observed, use of arbitration to resolve disputes over negotiation of contract terms tends to be inflexible:

> [L]itigation is essentially a non-creative process in labor relations. It tends to freeze existing practices and past relations.... The resulting drag upon the mobility and fluidity of the industry would be damaging to the economy.

Id. at 240.

[31] *NLRB v. Columbus Printing Pressmen*, 543 F.2d at 1170.

Company's right to continue the procedure during the term of the contract in the absence of mutual agreement to alter the procedure. The Union here had every opportunity to bargain over the procedure. It never did.

Clearly, the ability to rely on established past practice as the common law of the shop is of vital importance to every employer. Under the decision of the court below, however, an arbitrator acting under the arbitration clause of a multiemployer contract has the authority to disregard established local past practices which are not included in the agreement and may dictate completely new rules under which the parties must live. Accordingly, the only way an employer who bargains on a multiemployer basis may safeguard past practices is by reducing such practices to writing and including them in the collective bargaining agreement. As a practical matter, however, and as this Court has previously recognized, it is virtually impossible to "reduce all of the rules governing a community like an industrial plant to fifteen or even fifty pages."[32] Furthermore, an attempt to incorporate all the past practices of each employer into a multiemployer collective bargaining agreement would be completely antithetical to the basic purpose behind multiemployer bargaining. The decision of the court below thus creates an incentive for employers to bargain on a single employer basis and undermines the utility of multiemployer bargaining as an effective instrument of labor peace.

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[32] *Steelworkers v. Warrior & Gulf*, 363 U.S. at 579-580, quoting Cox, *supra* p. 10, at 1499.

CONCLUSION

For the foregoing reasons, a writ of certiorari should be issued to review the judgment and opinion of the Court of Appeals for the Sixth Circuit.

GREGORY J. SCHROEDTER
(Counsel of Record)
ROCKFORD R. CHRASTIL
SARA M. GREEN
BELL, BOYD & LLOYD
Three First National Plaza
70 West Madison Street, Suite 3200
Chicago, Illinois 60602
(312) 372-1121

Attorneys for Petitioner

Dated: April 11, 1983

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82-1671

No. 83-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

ITT CONTINENTAL BAKING CO., INC.,
HOSTESS CAKE DIVISION,

Petitioner,

vs.

BAKERY SALESMEN, DRIVERS,
WAREHOUSEMEN and HELPERS,
LOCAL UNION NO. 51,
affiliated with the
INTERNATIONAL BROTHERHOOD
OF TEAMSTERS, CHAUFFEURS,
WAREHOUSEMEN AND HELPERS
OF AMERICA,

Respondent.

APPENDIX

GREGORY J. SCHROEDTER
(Counsel of record)
ROCKFORD R. CHRASTIL
SARA M. GREEN
BELL, BOYD & LLOYD
Three First National Plaza
70 West Madison Street,
Suite 3200
Chicago, Illinois 60602
(312) 372-1121
Attorneys for Petitioner

Dated: April 11, 1983

Merrill/Gunthrop Warren, Chicago • 372-2800

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APPENDIX A

No. 81-1781

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BAKERY SALESMEN, DRIVERS, WAREHOUSEMEN AND HELPERS LOCAL UNION NO. 51, affiliated with the INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Plaintiff-Appellant,

v.

ITT CONTINENTAL BAKING COMPANY, INC., HOSTESS CAKE DIVISION,

Defendant-Appellant,

ON APPEAL from the United States District Court for the Eastern District of Michigan.

Decided and Filed November 1, 1982.

Before: EDWARDS, Chief Judge; MERRITT, Circuit Judge; JOHNSTONE, District Judge.*

MERRITT, Circuit Judge. The sole issue on appeal in this labor case arising from a multi-employer collective bargaining agreement requires us to interpret the meaning of a contract provision on arbitration. The issue is whether a dispute concerning a long-standing company collections policy comes

* The Honorable Edward H. Johnstone, United States District Judge for the Western District of Kentucky, sitting by designation.

within the scope of a contract clause providing for arbitration of "any charge of violation of this agreement, charge of discrimination, grievance or dispute." The company policy in question makes truck drivers who sell, deliver and collect for bakery products pay for accounting discrepancies in monies collected from customers. We hold that the dispute is arbitrable and reverse the judgment of the District Court setting aside the arbitrator's decision.

I.

Appellant, Bakery Salesmen, Drivers, Warehousemen and Helpers Local Union No. 51 (a Teamster affiliate) brought this action pursuant to § 301 of the Labor Management Relations Act, 29 U.S.C. §185 (1976), to enforce an arbitration award under a collective bargaining agreement between Local 51 and appellee, ITT Continental Baking Co., Inc., Hostess Cake Division. The District Court held that the dispute was not within the scope of the arbitration clause.[1] The Court therefore denied the union's motion for summary judgment and dismissed the complaint, a judgment which has the effect of setting aside the arbitrator's decision.

Local 51 and the company have been parties to a collective bargaining agreement covering the approximately 100

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[1]The District Court held as follows:

> Although the language in the arbitration clause may be ambiguous, we do not believe it can be reasonably interpreted to allow such "interest" arbitration. The arbitrator's interpretation is such an extraordinary encroachment on the powers of management that to imply such a meaning more specific language is necessary to support it. . . . The interpretation given by the arbitrator would result in the company being subject to binding arbitration on every management decision that was not expressly covered by the contract and which the union sought to modify. The only way that management could establish policy would be to specifically include it in the agreement, otherwise the policy would be subject to an arbitrable decision. . . .

driver salesmen who distribute Hostess Cake products to retail customers in the Detroit metropolitan area. The drivers delivered baked goods to some customers with authorized charge accounts who are billed directly by Hostess Cake and to other customers who must pay the drivers in cash or by check upon delivery. These collections are turned in to the company on a daily basis at "check-in time."

The arbitration award in question concerned one aspect of the check-in procedure that the company has established for the drivers. Upon return to headquarters at the end of the day, the driver must account for and turn in his collections as well as return unsold merchandise on his truck. The driver prepares a daily settlement sheet, recording the amount of cash, checks and coins received. He deposits the money and checks into an envelope, seals it, puts his route number, the date and the amount of the deposit on the outside and signs his name to the envelope. The envelope is dropped into a chute and falls into a metal safe. The driver receives no receipt or other verification that he has in fact enclosed the money and the checks listed on the settlement sheet in the envelope.

Thereafter the driver has no further control over what happens to the envelope. The next morning, other company employees open the safe, count the envelopes and seal them in canvas bags without opening or disturbing the contents of the envelopes in any way. An armored car service delivers the canvas bags to a local bank which acts as the company's depository. Sometime later bank tellers open each envelope and for the first time since the driver closed the envelope, the contents are counted. The tellers record on a tally sheet information including the date, individual driver deposit totals by route number, and any discrepancy between the amount

listed on the outside of the envelope and what is actually inside. Drivers are charged or credited with the shortages or overages discovered by the bank tellers, regardless of amount or fault. An employee who fails to pay a shortage is suspended.

Although the procedure has been in existence for several years, Local 51 has recently sought to change the procedure because of several incidents, including the case of Tom Bowker, a driver who was required to pay a shortage that turned out to be the bank's fault. Bowker filed a grievance protesting the company's decision to require him to make up a cash shortage of $400.00 on one of his daily deposits. Bowker denied the shortage was his fault, but the company forced him to pay. Three months later a bank executive advised the company that the shortage was caused by a bank employee. Bowker was credited for the shortage and received an apology.

In another case, the company forced driver Tom Pakledinaz to pay a $600.00 shortage. His entire envelope was reported missing when company employees opened the deposit safe the next morning. He investigated and discovered that two of the checks from his envelope had been cleared through a store owned by a company supervisor. Apparently the supervisor stole the envelope and converted the contents. The supervisor was fired. The driver's shortage was forgiven and he was repaid.

As a result of these and other incidents, one of which resulted in the filing of an unfair labor practice charge, the union's secretary-treasurer filed a class action grievance protesting the check-in procedure as a company work rule or condition. After an evidentiary hearing, arbitrator Harold J.

Dworkin found that no express term of the contract dealt with the company policy in question and that the subject had never been discussed in the industry-wide negotiations leading to the collective bargaining agreement. He found the dispute arbitrable and ordered the following relief:

> On the basis of the evidence it is the arbitrator's finding and conclusion that it would be fair, reasonable, and practical to provide that driver salesmen be accorded some form of verification so as to assure that the summary sheet, a copy of which is included in each daily envelope, accurately corresponds with the contents as recorded by the driver salesmen.... On balance it is the opinion of the arbitrator that providing a driver salesman on a daily basis with verification in the form of an entry on his 'pink slip' or a receipt would inure to the benefit of both driver salesmen and management. It would provide a preliminary audit for correction of errors as reflected by a second count and would provide security to driver salesmen that the amounts placed in the envelopes had been accurately recorded on the summary sheets and verified by a company representative.

The arbitrator retained limited jurisdiction for six months to provide a "reasonable trial period" for the changes he ordered so that the award would remain in effect or be modified "subject to review on the basis of experience." The company refused to comply with the award. Forty days later the union commenced this action in the District Court.

The collective bargaining agreement in question has historically been negotiated on a multi-employer basis covering various commercial bakeries in the Detroit area. Neither the union nor the company negotiators ever presented proposals

dealing with check-in procedures or discussed the subject at the bargaining table. Although the matter has been the subject of complaints and an unfair labor practice charge at Hostess Cake, the union viewed the dispute "essentially as a Hostess - Local 51 problem."[2]

II.

In the instance case, we have a broad no-strike clause pending arbitration given in exchange for a broad arbitration clause. The general approach to the interpretation of such arbitration provisions in collective bargaining agreements is governed by the *Steelworker Trilogy, United States Steelworkers of America* v. *American Mfg. Co.*, 363 U.S. 564 (1960), *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960), *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960), in which the Court established rules of contract construction strongly favoring arbitration coverage. In *American Mfg. Co., supra*, 363 U.S. at 567, the Court said that if "there is no exception in the 'no-strike' clause" then none "should be read into the grievance clause, since one is the *quid pro quo* for the other." In *Warrior & Gulf, supra*, the Court pointed out that in such situations arbitration "rather than a strike, is the terminal point of a disagreement" and with the exception of "matters the parties specifically exclude, all the questions on which the parties disagree must therefore come within the scope of the grievance and arbitration provisions." 363 U.S. at 581. "Doubts should be resolved in favor of coverage," and arbitration "should not be denied unless it can be said with

[2] Union president Picchi testified: "We don't seem to have it [the check-in procedure problem] as prevalent in other companies as this. I don't know. Maybe they [the other companies] use different bankers and they're all honest."

positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." *Id.* at 582-83. Arbitration coverage under broad provisions, the Court observed, should no longer be read as automatically excluding company policies that in the past have been considered "strictly a function of management." *Id.* at 584.

Obviously there are limitations on this broad language favoring arbitration coverage, but the District Court mischaracterized those limitations. The District Court observed that although the arbitration provision including "any disputes" is ambiguous, it would not resolve the ambiguity in favor of coverage because "the interpretation given by the arbitrator would result in the company being subject to binding arbitration on every management decision that was not expressly covered by the contract and which the union sought to modify." The District Court's view would turn the Supreme Court's rules of construction upside down because it would exclude from arbitration all disputes concerning company policies, procedures and working conditions not covered by some express term of the agreement. The *Steelworkers Trilogy* clearly contemplates arbitration of disputes not covered by the express terms of the agreement, including disputes concerning company policies, procedures and working conditions.

Instead of the approach followed by the District Court designed to protect "management functions" from encroachment, courts should follow a flexible, undogmatic approach in the interpretation of arbitration clauses, especially in the interpretation of collective bargaining agreements arising from multi-employer or industry-wide negotiations. Multi-employer negotiators tend to concentrate on basic matters of common concern to all parties in drafting the substantive

provisions of contracts. They tend not to focus on local problems in the interest of securing an agreement on universal issues. As counsel for the union points out in his supplemental brief:

> The exigencies of reaching a settlement will discourage either side from making proposals that are of particular interest to only one employer or to one group of employees. Because problems with this work rule have arisen only at Hostess Cake and employees at other companies might not want their check-in procedure changed, the 'milieu' [see *Morris* v. *Warner-Continental, Inc.*, 466 F.2d 1185, 1191 (6th Cir. 1972)] in which this contract was negotiated clearly supports the arbitrator's determination that the policy grievance was arbitrable.

In short, the policy favoring arbitration espoused in the *Steelworker Trilogy* applies with even greater force in situations involving local disputes governed by multi-employer agreements. Such local controversies need to be resolved by arbitration since the issues are unlikely to be addressed at the bargaining table.

It is unrealistic to say, as did the District Court, that management policy decisions are not subject to arbitration under a broad arbitration clause accompanied by a broad no-strike provision, just as it would be unrealistic to say that all such decisions are subject to arbitration. Management policies requiring salesmen to drive unsafe trucks or to sell adulterated food subjecting themselves to arrest would clearly constitute disputes subject to arbitration. Company policies regarding product pricing or the sugar content of cakes would appear just as clearly not to present arbitrable disputes. Whether an arbitration clause includes a dispute

concerning company policy in the multi-employer context depends on a number of factors: (1) the language of the arbitration clause; (2) the language of the no-strike clause; (3) the language of any management rights clause; (4) how directly the company policy in question affects employee working conditions and morale; (5) how directly the policy affects the company's profit structure and stockholders; (6) whether the dispute in question is industry-wide or limited to one employer; (7) the course of any contract negotiations concerning the disputed policy; and (8) whether any substantive provisions of the contract tend to support or negate the policy in question.

Applying these factors to the disputed policy here, we find (1) the arbitration clause is broad, covering "any dispute" without express limitation; (2) the no-strike clause is broad and is given in exchange for the broad arbitration clause; (3) there is no management rights clause in the contract; (4) the policy in dispute subjects employees to false accusations of defalcation and occasionally causes unjustified employee loss and the filing of unfair labor practice charges; (5) a change of policy would affect company profits only minimally; (6) the dispute is limited to one employer in the multi-employer group; (7) there were no contract negotiations on the disputed policy; and (8) no substantive contract provisions touch on the question. Thus, the first six factors mentioned favor arbitration, and the last two factors are neutral on the question.

Taking into account these factors and the preference for arbitration coverage found in the rules of contract construction set out in the *Steelworkers Trilogy*, we conclude that the District Judge erred in dismissing the union's complaint seeking confirmation of the arbitrator's decision.

Accordingly, the judgment of the District Court is reversed and the case is remanded for further proceedings consistent with this opinion.

APPENDIX B

Appendix B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

BAKERY SALESMEN, DRIVERS, WAREHOUSEMEN AND HELPERS LOCAL UNION NO. 51 A/W THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA,

Plaintiff,

v.

ITT CONTINENTAL BAKING COMPANY, INC., HOSTESS CAKE DIVISION,

Defendant.

Civil No. 81 71232

MEMORANDUM OPINION

The plaintiff union filed this motion for summary judgment to enforce the provisions of an arbitration award, which declared defendant's daily money check-in procedure "unfair" to its driver salesmen. This procedure required each driver to record on a deposit slip at the end of each day all the cash and checks received from sales made on an assigned route. This deposit slip was then placed in a sealed envelope and deposited in the company safe. The next morning, the company employees counted the sealed envelopes and recorded the information. Thereafter, the envelopes were delivered by armor car to the company's bank where the envelopes were unsealed by bank employees and the money

and checks counted and credited to the company account. The driver was required to reimburse the company for any shortages reported between the contents in the envelope and the deposit slip.

> The union filed a grievance which stated in part:
> ... I protest the check-in procedure at both branches of Hostess Cake Company. The present system does not provide any guarantee that the man has deposited the money or checks that he indicates on the deposit ticket. We would like the Company to check our envelopes to be sure that the amount of money and/or checks is the same as we indicate on the deposit ticket.

The arbitrator found this grievance arbitrable under Article XXIII, section 1(a) of the collective bargaining agreement which provides:

> It is agreed that, should any charge of violation of this agreement, charge of discrimination, grievance or dispute arise between the parties hereto, such matters shall be taken up within ten days of the alleged occurrence or it shall be deemed waived. The parties shall make an earnest effort to settle such controversy amicably, but if they fail to do so, it shall be submitted to arbitration as provided below.

In an award dated March 13, 1981, the arbitrator found that the grievance did not "arise under any *express* terms and conditions of employment as set forth in the agreement" and did not "charge the company with a violation of any provision of the agreement," but nevertheless was arbitrable because of the "comprehensive language defining a grievance which extends to any 'violation of this agreement' as well as a 'grievance or dispute' which may arise between the parties." Award

at 14. The arbitrator then considered the merits of the grievance and concluded that "it would be fair, reasonable, and practical to provide that driver salesmen be accorded some form of verification" that the contents of their envelopes correspond with their deposit slips. *Id.* at 14. The arbitrator then indicated that he would retain jurisdiction for six months to reconsider upon the written request of either party the new check-in procedure which he suggested. On April 24, 1981, the company did submit a request for reconsideration which was denied in a letter dated May 29, 1981. The union filed this action on April 21, 1981. On May 14, 1981, the company filed its answer with an affirmative defense which we treat as a counterclaim for vacation of the arbitration award.

The plaintiff contends that the company waived whatever defenses it may have had regarding enforcement of the award by failing to file a timely petition to vacate. Plaintiff argues that jurisdiction of the court is invoked pursuant to § 301 of the Labor Management Relations Act (LMRA), 29 U.S.C. § 185, and, therefore, timeliness is determined as a matter of federal law by reference to the appropriate state statute of limitations. The plaintiff argues that the appropriate state limitation period is the 20-day period provided in Michigan General Court Rule 769.9(2). Even if we were to apply Michigan's 20-day limitation period, defendant's challenge to the validity of the award is timely. The award itself provides a six-month trial period for a new check-in procedure suggested by the arbitrator. The arbitrator then retained jurisdiction so that he might review written requests by either party for reconsideration of the award. Presumably, if the suggested procedure took "an inordinate amount of time," the arbitrator would have set the award aside. The defendent sought such reconsideration and the award did not become final until the arbitrator decided the rehearing issue. The time period

could not begin to run until May 29, 1981, the date the arbitrator denied defendant's request to reconsider the award or re-open the record.

In any event, we believe the appropriate limitation period is the three-month period set forth in the United States Arbitration Act (USAA), 9 U.S.C. § 12, and conclude, therefore, that defendant's challenge to the validity of the award is timely. *Gas Workers Local No. 80* v. *Michigan Consolidated Gas Co.*, 503 F. Supp. 155 (E.D. Mich. 1980); *Lumber Production & Industrial Workers, Local 3038* v. *Champion International Corp.*., 486 F. Supp. 813 (D. Montana, 1980); *Communication Workers of America* v. *Pacific Telephone & Telegraph Co.*, 462 F. Supp. 736 (C.D. Calif. 1978). The plaintiff here has invoked the court's jurisdiction under both § 301 and the USAA. This lends support to the reasonableness of applying the limitation period set forth in the USAA.

The plaintiff's reliance upon *International Union* v. *Hoosier Cardinal Corp.*, 383 U.S. 696 (1966), and *United Parcel Service* v. *Mitchell*, U.S. , 41 U.S.L.W. 4378 (April 30, 1981) to support his contention that Michigan's 20-day rule is the appropriate limitations periods is misplaced. Neither *Hoosier Cardinal Corp.* nor *United Parcel Service* were direct actions to enforce or vacate an arbitration award as is involved here. Rather, they involved claims of the breach of the duty of fair representation tainting an otherwise binding arbitration process. Although recognizing that uniformity is necessary under the LMRA in order to mold a national labor policy, *Hoosier Cardinal* created an exception for statutes of limitation under § 301 because "there is no justification for the drastic sort of judicial legislation" that a federal common law limitation would represent. 383 U.S. at 703. The Court reasoned that no need for uniformity existed because the goal of such uniformity was to facilitate the "smooth functioning

of those consensual processes that federal labor law is chiefly designed to promote—the formation of the collective bargaining agreement and the private settlement of disputes under it. For the most part, statutes of limitation come into play only when these processes have already broken down." Where the validity of the arbitration award itself is being considered, rather than a collateral attack upon the process surrounding the issuance of the award, the process for private settlement has not broken down. Enforcement of the award is the culminating step in the process. The inquiry of the court when presented with such a case is limited to issues of whether the arbitrator acted within his authority under the bargained contract. Substantive or factual issues on the merits of the award are not addressed. *United Steelworkers* v. *Enterprise Wheel and Car Corp.*, 363 U.S. 593 (1960); *Timken Company* v. *United Steelworkers of America*, 492 F.2d 1178 (6th Cir. 1974). The decision whether to enforce an award is merely a safeguard to the private settlement mechanism which by avoiding arbitrary and capricious results facilitates its functioning.

Here, the arbitrator rejected the company's objection to the arbitrability of the union's grievance. The arbitrator believed that "interest" arbitration was permissible under the collective bargaining agreement and he proceeded to render an award on that basis. Plaintiff's attempt to characterize this action as a "rights" action appears to be unsupported by the facts, the collective bargaining agreement, or the language of the award. In his preliminary statement, the arbitrator indicates "the parties have acknowledged that the subject matter relating to the daily check-in procedure had not been the subject of prior negotiations, nor was it discussed at the bargaining table. The check-in procedure was unilaterally established by management several years ago. According to the testimony of witnesses, the procedure has

been in effect for some eighteen—twenty-one years." Award at 2. In his findings, the arbitrator stated that: "It is the conclusion of the arbitrator that the instant dispute, which involves the union's challenge of a certain aspect of the check-in procedure reasonably constitutes a dispute between the parties relating to terms and conditions of employment, *not* covered by the agreement and, therefore, constitutes an arbitrable issue. The grievance is in the nature of an *"interest"* dispute and is properly before the arbitrator for determination." Award at 8. (Emphasis added.) Although the union argues that "[the arbitrator's]. . . findings. . . indicate that in recent years the procedures have lost whatever acceptability or mutuality it may once have had," there appears to be no such finding. Union brief at 13-14. The union appears to regard such a finding implicit in the arbitrator's observation that "there had been a grievance filed in 1978 and numerous complaints on the matter in the past year and half." Certainly, the mere fact that the union has complained about a procedure and that several grievances had been filed does not make a 20-year policy suddenly devoid of acceptability or mutuality. Indeed, the company stated that there were only approximately 6 incidents regarding driver shortages in the last several years out of a complement of 82 drivers.

We believe that the interpretation given to the arbitration clause is simply not reasonable. Although the language in the arbitration clause may be ambiguous, we do not believe it can be reasonably interpreted to allow such "interest" arbitration. The arbitrator's interpretation is such an extraordinary encroachment on the powers of management that to imply such a meaning more specific language is necessary to support it. The arbitrator recognized this when he stated "the agreement contains no management right's clause. It must, therefore, be concluded that the company has retained the customary, and traditional rights of management except as

expressly restricted, or bargained away through the collective bargaining process, and as may appear in the agreement." Award at 8. The arbitrator does not, however, address this concern further. The interpretation given by the arbitrator would result in the company being subject to binding arbitration on every management decision that was not expressly covered by the contract and which the union sought to modify. The only way that management could establish policy would be to specifically include it in the agreement, otherwise the policy would be subject to an arbitrable decision on whether it was "fair, reasonable and practical" to modify it if so requested by the union. To receive this benefit all the union would need do is refrain from bargaining or negotiating regarding the policy. It seems to us that this is contrary to the collective bargaining process.

Accordingly, plaintiff's motion for summary judgment enforcing the arbitration award should be denied and the complaint dismissed without cost or attorney fees.

IT IS SO ORDERED.

/s/ ROBERT E. DeMASCIO
Robert E. DeMascio
United States District Judge

Dated: November 18, 1981

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

BAKERY SALESMEN, DRIVERS, WAREHOUSEMEN AND HELPERS LOCAL UNION NO. 51 A/W THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA,

Plaintiff,

Civil No. 81 71232

v.

ITT CONTINENTAL BAKING COMPANY, INC., HOSTESS CAKE DIVISION,

Defendant.

JUDGMENT

This matter having come before the court on plaintiff's motion for summary judgment enforcing the arbitration award, and the court having entered its Memorandum Opinion,

NOW, THEREFORE, IT IS ORDERED AND ADJUDGED

that plaintiff's motion for summary judgment be and the same hereby is DENIED and the complaint is hereby DISMISSED without cost or attorney fees.

Dated at Detroit, Michigan, this 18th day of November 1981.

/s/ ROBERT E. DeMASCIO

Robert E. DeMascio
United States District Judge

APPENDIX C

Appendix C

No. 81-1781

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BAKERY SALESMEN, DRIVERS, WAREHOUSEMEN AND HELPERS LOCAL UNION NO. 51, affiliated with the INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Plaintiff-Appellant

v.

ITT CONTINENTAL BAKING COMPANY, INC., HOSTESS CAKE DIVISION,

Defendant-Appellee

FILED
JAN. 11, 1983
JOHN P. HEHMAN,
CLERK

ORDER DENYING PETITION FOR REHEARING EN BANC

Before: EDWARDS, Chief Judge; MERRITT, Circuit Judge; JOHNSTONE, District Judge*

A majority of the court having not voted in favor of an en banc rehearing, the petition for rehearing has been referred to the hearing panel for disposition.

Upon consideration, it is ORDERED that the petition for rehearing be and hereby is denied.

ENTERED BY ORDER OF THE COURT

/s/ JOHN P. HEHMAN
Clerk

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* The Honorable Edward H. Johnstone, United States District Judge for the Western District of Kentucky, sitting by designation.

APPENDIX D

Appendix D

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 81-1781

BAKERY SALESMEN, DRIVERS,
WAREHOUSEMEN AND HELPERS
LOCAL UNION NO. 51 A/W THE
INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, CHAUFFEURS,
WAREHOUSEMEN & HELPERS OF
AMERICA,

Plaintiff-Appellant,

v.

ITT CONTINENTAL BAKING
COMPANY, INC., HOSTESS CAKE
DIVISION,

Defendant-Appellee.

Before: EDWARDS, Chief Judge; MERRITT, Circuit Judge; JOHNSTONE, District Judge.

JUDGMENT

APPEAL from the United States District Court for the Eastern District of Michigan.

THIS CAUSE came on to be heard on the record from the United States District Court for the Eastern District of Michigan and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District

Court in this cause be and the same is hereby reversed and the case is remanded for further proceedings consistent with the opinion of this Court.

It is further ordered that Plaintiff-Appellant recover from Defendant-Appellee the costs on appeal, as itemized below, and that execution therefor issue out of said District Court, if necessary.

ENTERED BY ORDER OF THE COURT

JOHN P. HEHMAN, CLERK

/S/ JOHN P. HEHMAN
CLERK

Issued as Mandate:
January 19, 1983

A True Copy.

COSTS: None

Attest:

Filing fee . . . . . $
Printing . . . . . $

/s/ Linda L. Brinson
Deputy Clerk

Total . . . . . $

APPENDIX E

Appendix E

AWARD OF ARBITRATOR
FEDERAL MEDIATION AND CONCILIATION SERVICE
VOLUNTARY LABOR ARBITRATION TRIBUNAL

In the Matter of the
Arbitration Between:
ITT CONTINENTAL BAKING COMPANY
HOSTESS CAKE DIVISION
Detroit, Michigan
-and-
BAKERY, SALESMEN, DRIVERS,
WAREHOUSEMEN AND HELPERS,
LOCAL UNION NO. 51

HARRY J. DWORKIN,
ARBITRATOR

GRIEVANCE: RE CHECK OUT MONEY PROCEDURE

APPEARANCES

On Behalf of Company

GREGORY J. SCHROEDTER
(William B. Hanley &
Associates, Ltd.) *Counsel for Company*

On Behalf of Union

GERRY M. MILLER
(Goldberg, Previant, Uelman,
Gratz, Miller, Levy &
Brueggeman, S.C.) *Counsel for Union*

THE ISSUE

SHOULD CHECK-OUT PROCEDURE BE MODIFIED SO AS TO PROVIDE EACH DRIVER SALESMAN SIGNED VERIFICATION OF CONTENTS OF ENVELOPE DEPOSITED ON A DAILY BASIS?

PRELIMINARY STATEMENT AND BACKGROUND:

The issue embodied in the grievance processed to arbitration does not appear on its face as involving any of the negotiated terms and conditions of employment. The current

collective bargaining agreement, effective for the period October 6, 1979 through October 3, 1982, contains no express language governing the check-in procedure. The parties have acknowledged that the subject matter relating to the daily check-in procedure had not been the subject of prior negotiations, nor was it discussed at the bargaining table.

The check-in procedure was unilaterally established by management several years ago. According to the testimony of witnesses, the procedure has been in effect for some eighteen—twenty-one years.

The union is here challenging one aspect of the check-in procedure. The union is protesting the company's refusal to provide each salesman driver with a signed, or initialed receipt verifying that the contents of the envelope deposited in a safe by each salesman driver on a daily basis correspond with the contents as appear on the driver's "daily cash and check record". The form that accompanies the envelope indicates the checks issued by customers, the amount of currency, coins listed by denomination, together with a summary of checks, currency, coins, and food stamps received by the driver in payment of merchandise.

The company considers the union's request unwarranted, and serving no meaningful purpose. The company asserts that, were the union's request to be granted it would entail a substantial amount of time on the part of company employees, together with additional costs. The union's request would impose an unwarranted burden without factual basis or benefit either to the company or driver salesman.

The company is engaged in the general baking business and distribution of its products to retail outlets. Its principal

product is sold under the trade name "Hostess Cakes". Distribution is made through two main distribution centers in the Detroit area, one being at Troy, and the other at Lavonia, Michigan.

Driver salesmen are represented by Local Union No. 51. There are approximately 100 driver salesmen within the bargaining unit divided between the Troy, and Lavonia distribution centers. Saiesmen drivers operate company vehicles on prescribed routes. The trucks are loaded with merchandise on each morning of a weekday. Driver salesmen deliver, and sell the products to various customers along routes to which each driver is assigned. Customers are divided into two categories as regards the method of payment for merchandise. One category consists of customers who have charge accounts, and are billed by the company on a monthly basis. All others pay for merchandise when delivered. Payment is made through cash, checks, or food stamps. Each driver salesman tenders a receipt for the amount paid by a customer whether in cash, or by check.

Upon returning to the distribution center at the end of a day the truck customarily contains unsold merchandise, or return of merchandise from customers. The truck contents are inventoried, and set aside for delivery to the company's thrift stores where it is sold at a reduced price. The driver's inventory is compared with the recorded dollar value of the merchandise issued to the driver salesman at the start of his work day. The driver salesman is then required to count the proceeds of his sales, noting the amount of cash, checks, coin, and food stamps, which information is recorded on a prescribed form. The proceeds are then deposited in an envelope, sealed by the driver, identified on the outside with the route

number, date, total deposit, and salesman's signature. The envelope is then placed in a shute, which in turn lodges the envelope in a metal safe.

The specific problem, and issue appealed to the Arbitrator for resolution in the form of an award stems from the fact that the driver salesman is not provided with a receipt at the time he deposits the envelope in the safe. The union is here seeking an award that would require a designated representative of the company to be present during the check-in procedure and count the funds, checks, and food stamps contained in each driver salesman's envelope, and verify same either by issuing him a receipt, or initialing the outside of the driver's "daily cash and check record".

In order to more fully understand the problem here presented, it is deemed appropriate to set forth with specificity the steps of the daily check-in-procedure observed by each driver salesman, which is as follows:

1. Checks out return of goods;
2. Unloads empty cake trays and puts them aside;
3. Proceeds to office to check-in receipts;
4. Completes daily cash and check record ("Settlement Sheet");
5. Each salesman driver stamps company's endorsement on back of each check (so as to guard against diversion, or misapplication of check);
6. Driver salesman then seals the flap of the envelope, and places it in shute for deposit in safe;
7. Yellow copy of settlement sheet delivered to supervisor; driver retains pink copy;

8. The safe is opened by two company employees on the following morning who count the envelopes (without disturbing the contents) and record the number of sealed envelopes.

The envelopes are then placed in canvas money bags and returned to the safe in a sealed condition. None of the company's employees thereafter count the envelopes, or disturb their contents. The canvas money bags containing the sealed envelopes are collected by Brinks Express, and delivered to the company's depository, National Bank of Detroit. Upon receiving the canvas bags bank tellers open each envelope and count the contents. A form is then filled out by the bank and delivered to the ITT Continental Baking Company. The form has columns indicating the following:

Deposit Date	Amount of Deposit	Route No.	Over*	Short**	Explanation	Driver Total

*The column "over" records the amount found in the driver salesman's envelope *in excess* of that which is recorded;

**The "short" column indicates any deficiency between the amount included in the envelope and that reported by the driver salesman on his settlement sheet.

Under the column "explanation" the bank teller notes explanatory information. The following notations are illustrative: "check $4.00 listed 7.74, error in addition"; or, "checks $23.92 — $22.99 & $20.00 listed, not enclosed." One such "explanation" appearing on a driver-salesman's summary sheet dated August 24, 1980, identified three checks that were listed on the driver's settlement sheet but were not found in the envelope when opened by a bank teller on the morning of delivery. It was later determined that the three

checks reported as missing were inadvertently left on the driver salesman's dresser, and when found were returned for deposit.

Of particular relevance to the instant dispute is the practice of charging each driver salesman with any shortages or discrepancies appearing in his envelope as noted by the bank. Similarly, each driver salesman is credited with excess funds in his envelope over and above that which he reported.

The union has urged that after the envelopes are deposited in the safe errors may occur on the part of others, including possible misapplication of funds. Envelopes may be misplaced after their removal from the safe. The contents may not be counted correctly by the bank tellers. Should any of the foregoing appear, the driver salesman may be subject to personal liability in event shortages may be reported by the bank due to errors, or wrongful acts on the part of others over which the salesman has no control.

The union urges that, were the company to provide each driver with a receipt, or verification of the accuracy of the contents of each envelope, it would substantially allay the driver salesman's concern, and protect him against discrepancies attributable to others, and occurring after the envelope is deposited in the company's safe.

GRIEVANCE AND CONTRACT PROVISIONS:

A grievance was filed under date of February 6, 1980, which is in the form of a policy grievance, on behalf of all sales employees within the bargaining unit represented by Local No. 51, and assigned to the two distribution centers. The text of the grievance is as follows:

> On behalf of all sales employees at Hostess Cake covered under the existing Agreement with Local No. 51, I protest the check-in procedure at both branches of Hostess Cake Co. The

> present system does not provide any guarantee that the man has deposited the money or checks that he indicates on the deposit ticket. We would like the Company to check our envelopes to be sure that the amount of money and/or checks is the same as we indicate on the deposit ticket.

A prior grievance dated August 19, 1978, was introduced into evidence in which Tom Bowker, a driver salesman was charged with a deficiency in his envelope of $404.00. However, it was later determined that the discrepancy resulted from an error of the bank. The driver was reimbursed by the bank for the amount with which he was charged, together with interest. The prior grievance related principally to a complaint on the part of the driver that he had been improperly charged with $404.00; the grievance did not expressly request that the check-in procedure be revised. However, the text of the prior grievance is relevant in that it serves to provide relevant background with reference to the policy grievance presently before the Arbitrator:

> On July 8, 1978 I made a deposit into company safe, $86.00 in checks, $404.00 cash. I forgot to list money on deposit slip while checking out. Money was stolen after being deposited into safe. Bank shows record of receiving checks only. Company made me pay $404.00 on August 18 or I could not work Aug. 19. Stewart talked to supervision on Aug. 15, and said I had to pay.
>
> My grievance is having to pay money that was stolen after being put in safe. There are no steps taken to assure money is deposited and no protection for the route person. We are responsible for the money after it is dropped into safe, which we have no control of. We can't even use a check for the cash deposited. This is

a terrible way of handling money and the company does not really care much since route man is responsible.

From what I understand there are few people that handle money from the route man to the bank. Why can't they find out who stole the money, instead of taking the path of least resistance and making the route man pay.

Since the company seems satisfied with this poor security system and do not allow the route man any protection, they should be held responsible for stolen money, and then they would find a better way of handling money.

/s/ Tom Bowker

As heretofore indicated, the collective bargaining agreement contains no express language, or reference to the check-in procedure. The following provisions define the scope of grievances or complaints that may be referred for final and binding decision by a Board of Arbitration, a Board having been waived in the instant case:

ARTICLE XXIII — ARBITRATION

Section 1. Grievance Procedure

(a) It is agreed that, should any charge of violation of this Agreement, charge of discrimination, grievance or dispute arise between the parties hereto, such matter must be taken up within ten (10) days of the alleged occurrence or it shall be deemed waived. The parties shall make an earnest effort to settle such controversy amicably, but if they fail to do so it shall be submitted to arbitration as provided below.

As appears in the language of Section 1(a), grievances that may be appealed to arbitration include charges of violation of

express provisions of the Agreement, charges of discrimination including any "grievance or dispute" that may "arise between the parties". It is the conclusion of the Arbitrator that the instant dispute, which involves the union's challenge of a certain aspect of the check-in procedure reasonably constitutes a dispute between the parties relating to terms and conditions of employment not covered by the Agreement, and therefore, constitutes an arbitrable issue. The grievance is in the nature of an "interest dispute and is properly before the arbitrator for determination on the merits.

The Agreement contains no "management rights clause". It must therefore be concluded that the company has retained the customary, and traditional rights of management except as expressly restricted, or bargained away through the collective bargaining process, and as may appear in the Agreement.

POSITION OF UNION:

The union acknowledges that the problem, and request for relief are not expressly covered by any language appearing in the Agreement. However, the issue is one of major concern to driver salesmen, and, unless resolved will continue to plague the parties generating concern, and insecurity on a continuous and daily basis. The union points out that after a driver has completed his settlement sheet, and deposits the fund in a sealed envelope he is haunted by fear that discrepancies will thereafter be reported and that he will be unjustly charged with shortages due to error, or misapplication of funds by others who handle the envelope and contents after they are deposited in the company's safe.

The heart of the union's complaint is that no company official checks, or counts the contents of the driver salesman's envelope prior to sealing, and placing it in the safe. The

functions of the two company employees are limited to counting the number of sealed envelopes, and then placing them in canvas bags for Brinks Express to deliver to the company's depository.

The union reasons that there is an omnipresent concern on the part of the driver salesmen that an unexplained loss, or theft may occur *after* the envelope is sealed, and deposited. Such discrepancy may be due to error, or even criminal activity on the part of third parties over whom the driver salesman has no control. The driver salesman is informed by an official of the company in event the bank deposits reflect shortages, or overages which are attributed to each individual driver. Even though reports of a shortage may not be due to any error on the part of the employee, nevertheless,

> ...he is instructed to make good the shortage within a designated number of days, or be subject to being debited or being subject to disciplinary action.

The gravamen of the union's complaint is, that, driver salesmen are accorded no opportunity to make an explanation, nor are they permitted to check the bank tellers' accuracy who count the contents of the envelopes, and record the results. The union reasons that a bank teller may report deficiencies, or overages in a driver salesman's daily envelope which may be due entirely to error on the part of the bank employee, or even criminal activity. As a result of errors on the part of others,

> ...the driver salesman may in effect be accused of being a thief, without any proof to substantiate the charges.

The union emphasizes that the driver salesman has no control over the envelope, or its contents after it is sealed, and placed in the safe.

The union is here seeking an award which would effect a change in the check-in procedure at both distribution centers, and accord reasonable protection to driver salesmen as regard unwarranted claims of shortages, or overages. The union requests that the check-in procedure be revised so as to insure that the amount of money, and checks which the driver has counted, and deposited in the envelope are certified by a company employee who would conduct a separate count, or audit. The union requests that a receipt be given to each driver salesman so as to eliminate the "continuous cloud", concern, and insecurity to which driver salesmen are subject under the existing procedure.

POSITION OF COMPANY:

The company contends that its present check-in procedure is reasonable, and provides adequate means for employees to expeditiously check-in, and report their daily receipts without subjecting either the salesman driver, or company to any unreasonable burden, or expense. The company points out that the existing check-in procedure has been in effect for at least as long as eighteen years, and that it has functioned satisfactorily. Such conclusion is demonstrated by the fact that there have been but a few instances of any substantial errors, or discrepancies as regard the amounts recorded on the driver salesman's settlement sheet, and report of the company's bank after the contents were counted, and tallied.

The check-in procedure requires each driver salesman to make a daily accounting of the products for which he has been charged, as well as the left-over items that are returned at the end of the day. The driver salesman is required to make an accurate report of the day's receipts in the form of checks, cash or food stamps, all of which must be in balance.

It is considered reasonable to require that each individual driver be responsible for counting and recording his daily

receipts, and accurately completing the settlement sheet. The funds are placed by each driver in a manila envelope, sealed, signed, and deposited in a safe. The driver is adequately protected inasmuch as he retains a pink copy showing the contents of the envelope recorded in his own handwriting. All envelopes placed in the safe by driver salesmen are counted the following morning by two company employees. They are required to open the safe, remove the sealed envelopes, conduct a count of the envelopes (not their contents) and then place the envelopes in canvas bags.

The company emphasizes that its employees do not break the seal, or open the envelopes, nor do they concern themselves with the contents. Their sole tasks are to count, and record the number of envelopes, place the envelopes in a canvas bag, and make them ready for collection by Brinks. The sealed canvas bags are collected by Brinks, who in turn delivers them to the company's bank.

After the canvas bags are delivered to the bank, tellers count the contents of the envelopes, conduct a final audit, and the results are posted indicating any discrepancies attributable to individual drivers in the form of shortages, or overages. The number of discrepancies have been limited, as indicated by some 6-8 incidents either short, or over encompassing several years, out of a total complement of some 82 drivers.

Although the check-in procedure has been in effect for some twenty-one years, the subject matter had never been raised during negotiations by either side, and only a very few grievances have been filed. One such dispute which arose in 1976 in the form of an unfair labor practice charge related to Driver Salesman T. Pakledinaz. The problem resulting from a complete disappearance of the employee's envelope referred to as "Cash Turn-in of March 5, 1976". The company had taken the position that the salesman was responsible for

the loss, or disappearance of his envelope; and, that a driver salesman cannot "waive his responsibility to properly turn in his/her daily cash receipts (properly recorded *and* deposited into a safe) * * *". In the case referred to, after careful consideration the company concluded that "the facts in this case appear not to warrant restitution by Mr. Pakledinaz."

It is acknowledged that the envelope was missing. The company believed that Pakledinaz had never dropped the envelope in the chute. A security investigation disclosed that a management employee found the envelope outside of the safe, thereby indicating neglect in failing to assure that the envelope was deposited in the safe. In light of these "unique circumstances" the unfair labor charge was settled on a "non-precedent basis."

In the letter to the union the company advised that restitution would not be required; however, the company reiterated the responsibility of driver salesmen:

* * *

> It must remain understood, however, that all sales representatives MUST properly turn in daily receipts and the variance granted in this particular case shall, in no way, alter the etablished past practice of employees' making full restitution upon failure to properly account for their funds. The facts in this particular case are unique and it shall not be considered a precedent in any way, shape or form.
>
> Any future instances of failure to properly account for such funds will result in the sales representative's making full restitution.

On the basis of the company's proposal not to require restitution, the union, and driver salesman withdrew their unfair labor practice charge, and stated as follows:

* * *

> I also agree that the circumstances surrounding the loss of the envelope on or about March 5, 1976, were very unique, and that this instance does not alter or modify my responsibility of making sure that all my envelopes are properly placed in the company safe nightly.
>
> The settlement of this one situation is not to be considered as setting a precedent of relieving me, or any other Route Sales Representative, of our responsibility in properly securing our settlement envelopes.

It is the company's position that no change, or modification in the existing procedure is warranted, or required. The company maintains that its daily and weekly settlement sheets constitute documents,

> ...whereby each salesperson properly accounts for merchandise delivered to him (her) by the Company. It is the absolute responsibility of such salesperson to *accurately* and *honestly* complete the forms and properly report on all of his (her) sales transactions. When signed by the salesperson, they become representations of the truthfulness of all statemetts and numbers therein. Any falsification of matters appearing on the Settlement Sheets constitutes a criminal act and could subject the salesperson to legal sanctions.

* * *

ARBITRATOR'S FINDINGS AND OPINION:

The subject matter before the Arbitrator does not constitute a grievance arising under any *express* terms and conditions of employment as set forth in the Agreement; nor does the grievance charge the company with a violation of any

provision of the Agreement. The dispute is in the nature of a policy grievance in which the union seeks relief in the form of an award that would modify the existing check-in procedure so as to provide each driver salesman with a receipt, or other form of verification of the funds turned over to the company, or dropped in the safe at the end of each day's activities.

The evidence establishes that the union has never attempted to negotiate, or effect a change in the existing procedure at the bargaining table. The existing check-in procedure has been in effect, and has remained unchallenged for at least as long as twenty-one years. The evidence indicates further that Local 51 has over a period of some 1½ years importuned management on several occasions to provide verified receipts to drivers of the contents of their envelopes on a daily basis.

The contract contains no specific or express management rights clause. It must therefore be considered that the company has retained all of its managerial rights, and residual prerogatives not expressly, or by clear implication restricted, or modified by language appearing in the Agreement.

In light of the broad, and comprehensive language defining a grievance which extends to any "violation of this Agreement" as well as a "grievance or dispute" which may arise between the parties, it is the judgment of the Arbitrator that the question posed is arbitrable on its merits. Resolution of the issue requires an assessment of the evidence so as to determine whether the union's request is fair, reasonable, and warranted, and requires that appropriate relief be fashioned in the form of an Award.

The Arbitrator has thoroughly studied, considered, and evaluated the positions of the parties as reflected by the evidence adduced at the arbitration hearing, including well-

reasoned post hearing briefs. On the basis of the evidence it is the Arbitrator's finding and conclusion that it would be fair, reasonable, and practical to provide that driver salesmen be accorded some form of verification so as to assure that the summary sheet, a copy of which is included in each daily envelope, accurately corresponds with the contents as recorded by the driver-salesman. Such verification need not be in any precise form. It would suffice if a representative of the company, whether he be a bargaining employee or outside the bargaining unit make his own count, and either initial the pink slip retained by the driver salesman, or provide a separate receipt.

The Arbitrator is fully aware that additional time may be involved in recounting the contents of the envelopes, estimated at some six minutes for each driver salesman, for approximately forty employees at each of the two distribution centers. It would also appear that in most instances the totals recorded by the driver on his summary sheet would be correct, and require merely a simple verification on an adding machine. In still other instances, the time required may be somewhat longer. The time involved would also constitute an additional burden in the form of "waiting time" assumed by driver salesmen, inasmuch as they are paid strictly on a commission basis. The time involved while waiting for verification and recount might in some instances be extensive for which compensation would not be required. Since driver salesmen are paid on a commission basis only, the company would not be saddled with any additional costs resulting from drivers being required to wait at the distribution center in order to complete the procedure as directed by the Arbitrator. The company's additional cost would be limited to the services of one, or more company representatives during the period required to verify the contents of the envelopes.

In event it should be determined on the basis of a reasonable trial period that an inordinate amount of time is required in counting and verifying the contents, and correcting discrepancies, any such problem should be subject to review on the basis of experience. The Arbitrator will therefor retain jurisdiction for a period of six months, at the end of which time written request made by either party may be reviewed, and the Award reconsidered.

The Arbitrator notes the concern of the company that were it to assign bargaining unit employees to count, and verify the returns of the driver salesmen it may present problems involving dual loyalty, and the possibility of collusion (which the company acknowledges would be unlikely). Should such problems arise, the company would have the inherent right to adequately protect itself against any such adverse consequences. Should instances arise of disloyalty, or collusion in implementing the verification procedure such would be subject to application of appropriate discipline, including discharge where the circumstances warrant.

On balance it is the opinion of the Arbitrator that providing a driver salesman on a daily basis with verification in the form of an entry on his "pink slip", or a receipt would inure to the benefit of both driver salesmen, and management. It would provide a preliminary audit for correction of errors as reflected by a second count, and would provide security to driver salesmen that the amounts placed in the envelopes had been accurately recorded on the summary sheets, and verified by a company representative. Such procedure would serve to eliminate the,

> ...constant worry and concern, as to whether the contents of the envelope will be

fully accounted for after it is placed in the company's possession, and the driver no longer has no control.

Respectfully submitted,

/s/ HARRY J. DWORKIN

HARRY J. DWORKIN,
ARBITRATOR

E-19

AWARD

In the Matter of the Arbitration Between:

ITT CONTINENTAL BAKING COMPANY
HOSTESS CAKE DIVISION
Detroit, Michigan

—and—

BAKERY, SALESMEN, DRIVERS,
WAREHOUSEMEN AND HELPERS,
LOCAL UNION NO. 51

I.

The check-in procedure relating to driver salesmen at the two distribution centers (Troy and Livonia, Michigan) shall be modified so as to require that a representative of management be present during times that driver salesmen check in, and be required to count the contents of their envelopes, and compare same with the amounts recorded on the daily settlement sheet;

II.

After such verification, the driver salesman shall be issued a receipt for the contents of the envelope, or, such verification may be noted on the driver's "pink slip" by affixing the date, and initials of the person making the verification;

III.

It shall be the responsibility of each driver to seal the envelopes, and personally deposit it in the safe provided for such purpose;

IV.

The Arbitrator will retain jurisdiction for a period of six (6) months from date of this Award; either party may, prior to

the expiration of said six month period make a written request for reconsideration, review, or modification of the foregoing Award;

V.

In the event such request is filed, the Arbitrator will consider in addition to the evidence heretofore presented such new evidence as relates to the operation of the check-in procedure pursuant to this Award.

AWARD SIGNED, ISSUED AND DATED AT CLEVELAND, CUYAHOGA COUNTY, OHIO, THIS 13TH DAY OF MARCH, 1981.

/s/ HARRY J. DWORKIN

HARRY J. DWORKIN,
ARBITRATOR

APPENDIX F

AMERICAN ARBITRATION ASSOCIATION

In the Matter of the Arbitration	)
between:	)
	)
ITT CONTINENTAL BAKING	)
COMPANY, HOSTESS DETROIT,	)
	)
and	)
	)
TEAMSTERS LOCAL 51.	)

Proceedings had and testimony taken in the above-entitled matter before Arbitrator Harry Dworkin, at 1234 City National Bank Building, Detroit, Michigan, on Thursday, November 20, 1980.

APPEARANCES:

GERRY MILLER, ESQ.
788 North Jefferson Street
Milwaukee, Wisconsin 53202
Appearing on behalf of Union

WILLIAM B. HANLEY AND ASSOCIATES, LTD.
29 South La Salle Street
Chicago, Illinois 60603
(By Gregory J. Schroedter, Esq.),
Appearing on behalf of Company.

OPENING STATEMENT OF COMPANY COUNSEL, MR. SCHROEDTER

1-19 * * *

20 * * * I would like to expand on a position in counsel's opening remarks. And I'd like to begin by giving you a background with respect to the industry, Continental Baking Company is a wholesale business, as you know. It's a wholesale procedure and distributor of bakery products. And it maintains facilities throughout the United States, including a Hostess Cake Plant here in Detroit, Michigan.

Now, the product, the cake product that is produced at the Hostess Plant is taken by transport out to these two what are called branches, or agencies, or depots.

Those terms are used interchangeably.

One located in Troy, Michigan and the other one located in Livonia, Michigan.

And at these branches, or depots, or agencies, the product is taken off the transport, broken down, and ends up on these route trucks.

21-33 * * *

34 * * * The Union has never attempted to bring this matter up in the negotiations. And we believe that this procedure, which has been in effect for an excess of 14 years, is a well-established past practice concerning the Company's control of operations. And that the arbitration form is not the place to change that type of a procedure.

If they have wanted to change it, they could have brought it up during negotiations.

34 * * *

35-39 * * *

40 * * * ARBITRATOR DWORKIN: Okay. Before we have a recess, Mr. Miller, could you comment on Mr. Schroedter's inference or statement, that this procedure has been in effect for, according to the Union, 14 years, and the Company claims 18 years, that there have been contract negotiations during this interim, and that the question has never been raised at the bargaining table?

Again, I say this is a representation made by the Company counsel. I do not accept it, as such, as a fact, because these are opening statements. But would you care to comment on that.

MR. MILLER: I believe it to be true, that the matter had not been — has not been raised to negotiation by either side, Mr. Arbitrator.

40 * * *

41-46 * * *

47 ARBITRATOR DWORKIN: All right. The Union may proceed.

MR. MILLER: The Union calls Louis Picchi.

LOUIS PICCHI

EXAMINATION BY MR. MILLER:

Q. Would you please state your full name for the record.

A. Louis Picchi, P-i-c-c-h-i.

Q. By whom are you employed?

A. Local 51.

Q. What capacity?

A. President and Business Agent.

Q. How long have you been a President and Business Agent of Local 51?

A. February 5, 1975.

Q. Before that, what did you do?

A. I was Hostess Cake salesman.

Q. For how long?

A. From 1948 to 1975.

Q. Twenty-seven years?

A. Twenty-seven years.

Q. You say Hostess Cake salesman, is that the same as driver-salesman?

48 A. Driver-salesman, yes, sir.

Q. What agency or depot of Hostess Cake did you work at?

A. We started out at the Oakman Boulevard. Then we went to Chicago and Livernois. Then he went to Livonia.

Q. So when you left Hostess Cake in '75, you've been working out of Livonia?

A. Livonia depot.

Q. And for how long did you work out of Livonia?

A. Well, for a time we moved from Chicago and Livernois to Livonia. I don't know what the time span was there.

Q. Did you hold any office or position with the Union when you worked for Hostess Cake?

A. Yes, sir, I was a steward.

Q. For how long?

A. Approximately 20 years.

Q. Did you hold any other office or position with the Union during that period?

A. Well, I was a recording secretary of Local 51. I was also a trustee.

Q. With the Local?

A. With the Local.

Q. Did you have function with respect to negotiating contracts while you were a Hostess Cake driver-salesman?

49 A. I have been on negotiating committees for a number of years.

Q. Just so the Arbitrator understands the nature of negotiations, does Local 51 negotiate its agreements with Hostess Cake individually, or are there other people involved?

A. No, sir. Whe had multi-employer negotiations in the last — years ago. It took in everybody in the cake and bread business. But in the last six years or so only ITT Continental and Taystee Bread or American Baking Company were involved in the multi-employer negotiations.

Has Local 51 entered into the 1979-1982 salesmen agreement with companies and firms other than Hostess Cake?

A. Yes, sir.

Q. Could you name some of the other companies or firms that have signed this agreement?

A. Hostess, Wonder, Wonder Bread, Taystee, Brown Bunn, Schafer's Koepplinger's.

Q. Are there others you have not named?

A. I think there is. I think there is some that won't come to mind.

49-51 * * *

52 * * * Q. Had the Local, to your knowledge, ever attempted to negotiate a change or changes in the cash and check-in procedure, in your experience, either on the negotiating committee as a rank and filer, or since going with the Union full time?

A. I don't think we've ever tried in formal negotiations. We have in meetings, side meetings, but never as a formal demand.

Q. Why not?

A. Well, actually, I think maybe because we were naive. We always thought, well, the banks, the banks don't make mistakes. And it's all down through the years we have had mistakes ever since we started the bank system.

And when we were at Chicago, we went so far as to short one envelope and give another envelope more money to see if it would come back.

And it invariably, it would come back, right. But we would have lost envelopes. We would have shortages that people swore they put in. And they didn't.

So we would always work on the assumption the bank was right until actually here this Bowker case a couple of years ago when the bank itself admitted that they could lose money in the system, and that the man himself would have to be charged with it.

For instance, I had a case on January — on June 22 where the man called — Bruce Parker lost his envelope.

53-60 * * *

61 * * * Q. Now, later in 1979, following this meeting, did you renegotiate the salesman's agreement with Hostess Cake?

A. Yes, sir.

Q. I take it there was no effort by the Union to negotiate the language that would change the check-in procedure, is that it?

A. No. But we had a couple of side meetings. I had one. And I know the steward from Troy, Ben McKerriher, had one with Fiefer.

Q. In attempt to resolve the basic problem?

A. Right. In an attempt to resolve the check-in system.

61 * * *

62-101 * * *

CROSS-EXAMINATION OF MR. PICCIHI

BY MR. SCHROEDTER

102 * * * Q. So all of the incidents to which you testified that raised the concern in your mind concerning the check-in procedure all occurred prior to October '79, correct?

A. Right.

Q. And it is not true that in October of '79 you negotiated this new current contract with the Company?

A. That is not true.

Q. That is not true.

103 A. No. Because we didn't — we didn't formulate, formally try, but we had a discussion with Fiefer — I had a discussion with Fiefer about this new — because at that sixth meeting on Parker's meeting, we had left it that we were going to try to talk to the Company to make changes.

Q. Let me stop. Let me stop for a minute. Did you make a formal proposal to the Company.

A. No, sir.

Q. In writing that a change in that check-in procedure be made?

A. No.

Q. Did you make a formal proposal to the Company orally, over the bargaining table, that the check-in procedure be changed?

A. No, sir. Just on side meetings.

Q. All you had was a side bar conversation with Jack Fiefer who, at that time, was the labor relations manager for the Detroit area

MR. MILLER: Do you know what a side bar means?

A. Very definitely.

103 * * *

104-112 * * *

113 * * *

RE-EXAMINATION OF MR. PICCIHI BY MR. MILLER

Q. Number two, I am not clear as to the status of your efforts to resolve this problem. During the

course of your negotiations of the contract with spokesmen for the industry last year, first of all, did you ever attempt to negotiate a contract language to put in the agreement, to cover this problem?

A. No, sir.

Q. Why not?

A. I don't know. Because like I said, we were very naive. We always thought the bank was right.

Q. I take it you have been engaging in on-going discussions with the Company of Hostess with this problem?

A. Right.

Q. Before and after your negotiations of your last contract, is that correct?

A. Right, right.

114 Q. Is there a reason why you have not attempted to negotiate contract language as opposed to a new language in your industry contract to cover this situation?

A. *There's no reason that I know of.* (emphasis added).

114 * * *

115-156 * * *

157 * * * ROBERT HEISS, was thereupon called as a witness herein, and after having been first duly sworn to tell the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EXAMINATION BY MR. SCHROEDTER:

Q. Would you please state your full name for the record?

A. Robert Heiss, H-e-i-s-s.

Q. And where do you live, Mr. Heiss?

A. 17280 Cornell Road, Southfield, Michigan.

Q. By whom are you employed?

A. ITT Continental Baking Company.

Q. And in what capacity are you employed by ITT Continental Baking Company.

A. General manager.

158 Q. Of?

A. Of ITT Continental Baking Company, Detroit, Michigan, Hostess Cake.

Q. Hostess Cake Plant?

A. Hostess Cake.

Q. How long have you been employed as general manager of the Detroit Hostess Cake Plant?

A. Eleven years.

Q. And how long have you been employed with Continental Baking Company?

A. Thirty-four and a half years.

Q. What is the business of Continental Baking Company?

A. We manufacture and distribute cake products in the State of Michigan.

Q. Can you describe your distribution system?

A. At Oakman and Twelve Street we manufacture the cake product and then it is distributed by semis to our branches, Troy and Livonia, which in turn is redistributed onto route trucks. And, in turn, these route trucks make retail outlets, schools,

158 * * *

158-187 * * *

188 Q. That will be Company Exhibit 8. I am showing you what has been marked as Company Exhibit 8. Can you identify that document?

A. Yes.

Q. What is it?

A. Addressed to Mr. Louis Picchi, Teamster Local 51, Trumbull Avenue, Detroit, Michigan. Loss of — turned in envelope March 5, 1976, Tom Patladinas.

Q. Is that your signature which appears on the bottom?

A. Yes, sir, yes, sir.

Q. Did you sign that on or about the date that appears, that is, May 13, 1977?

A. Yes.

Q. On the bottom left-hand corner, do you see two other signatures?

A. Louis Picchi and Tom Patladinas.

Q. Did Louis Picchi sign this in your presence?

A. Yes.

Q. And you recognize the signature, of course?

A. Yes, sir.

Q. You've seen it before?

A. Um-hum.

189 Q. Would you please read the first sentence of the second paragraph?

"It must remain understood, however, that all salesmen representatives must properly turn in daily receipts and the variance granted in this particular case shall in no way alter the established past practice of employees making full restitution upon failure to properly account for their funds."

Q. Would you also turn over to the second page, and you see another three paragraphs, do you not?

A. Yes.

Q. Followed by three signatures?

A. Yes.

Q. Do you recognize those three signatures?

A. Yes, sir.

Q. Whose are they?

A. Patladinas, Ben McKerriher, and Lou Picchi.

Q. And Lou Picchi is the President of the Teamsters Local 51, and McKerriher is the witness who testified here today. Did they sign it in your presence also?

A. Yes.

190 * * * Q. (By Mr. Schroedter, continuing): Would you also read into the record the second paragraph beginning with "And that", along with the third party —

A. "And that this instance does not alter or modify my responsibility of making sure that all my envelopes are properly placed in the Company's safe nightly."

Q. Third paragraph?

A. "The settlement of this one situation is not to be considered as a precedent or of relieving me or any other route sales representative of our
191 responsibility in properly securing our settlement envelopes."

Q. Okay. Thank you. Let me have that back.

ARBITRATOR DWORKIN: What Exhibit is this?

MR. SCHROEDTER: Company Exhibit 8. I have to make a copy of that.

Q. (By Mr. Schroedter, continuing): Now, after this agreement was entered into on May 13, 1977, Company Exhibit A, did you put out a communication to the employees regarding the check-in procedure?

A. Yes.

Q. I'm showing you what's been marked as Company Exhibit 9. Can you identify that document?

A. Yes.

Q. What is it?

A. It's a recommended settlement sheet acknowledgement.

Q. It talks about the settlement sheet itself and the checking-in process?

A. Yes, right.

Q. Who's it signed by?

A. Signed by myself, Robert Heiss, General Manager.

Q. All right. And —

192 A. And Thomas Bowker.

Q. Who acknowledges receipt of an understanding of the policy, is that correct?

A. Right.

Q. Now, Bowker's name appears then, and the date 2-15, but there's no year date. When did Bowker begin employment with the Company?

A. February 13, 1978.

Q. And was it a policy, at that time, that all new employees be required to fill this out and sign it?

A. Yes, sir. Yes.

Q. All right. I'm sorry. Just one last question. Okay. Just one final question, then I'll be through, but I think it's basically out through the testimony of Mr. Picchi that: Did the Union ever attempt to negotiate at the bargaining table a different check-in procedure?

A. No.

Q. I'm talking about this current contract which begins in '79?

A. No.

Q. Okay. Did you receive any written proposals from the Union to change the procedure over the bargaining table?

A. No.

193 Q. Receive any oral proposals from the Union to change the procedure over the bargaining table?

A. No.

MR. SCHROEDTER: I have no further questions.

A. I was at each one of them.

Mr. SCHROEDTER: You were at all the bargaining sessions?

A. Yes.

193 * * *

Appendix F

1979-1982 SALESMEN'S AGREEMENT

AGREEMENT BY AND BETWEEN

_____

AND

BAKERY SALESMEN, DRIVERS, WAREHOUSEMEN AND HELPERS, LOCAL UNION NO. 51

OCTOBER 6, 1979 to and including OCTOBER 3, 1982

Joint Exhibit A

INDEX

ARTICLE XXIII — ARBITRATION

Section 1. Grievance Procedure

(a) It is agreed that, should any charge of violation of this Agreement, charge of discrimination, grievance or dispute arise between the parties hereto, such matter must be taken up within ten (10) days of the alleged occurrence or it shall be deemed waived. The parties shall make an earnest effort to settle such controversy amicably, but if they fail to do so it shall be submitted to arbitration as provided below.

(b) It is expressly agreed, however, that no employee covered by this Agreement shall have the right to compel the arbitration of his grievance without the written consent of the Union.

Section 2. Selection of an Arbitrator

(a) In the event such controversy has not been settled amicably within ten (10) days after it has been presented, it shall then be submitted to an Arbitration Board, consisting of two (2) representatives of the Employer and two (2) representatives of the Union. Such appointments shall be made within five (5) days. These four (4) representatives, upon failure to settle the controversy shall attempt to select a neutral party or Arbitrator within five (5) days.

(b) Should the representatives of the Union and the representatives of the Employer fail to agree on the neutral party or Arbitrator within five (5) days, they shall jointly request the Federal Mediation and Conciliation Service to submit a list of five (5) suggested Arbitrators from which list one (1) will be chosen by each party, striking two (2) names and the remaining name on said list shall become the neutral party or Arbitrator and arrangements shall be made to hold a hearing before said Arbitrator as quickly as possible.

(c) During such proceedings, there shall be no lockout, strike, or stoppage of work and the decision of said neutral party or Arbitrator shall be final and binding upon both parties hereto.

Section 3. Arbitration Expenses

The expenses of the representatives appointed by the Union shall be paid by the Union and the expenses of the representatives appointed by the Employer shall be paid by the Employer. Any mutual expenses, including fee and expenses of the neutral party or Arbitrator shall be borne equally by the Employer and by the Union.

Section 4. Disputes Over Renewal Agreements

The above mentioned procedure shall not apply to any disputes arising out of negotiations of any subsequent Agreement.

ITT Continental Baking Company Inc.

Wonder Bakery

1100 Oakman Boulevard
Detroit, Mich. 48238
(313) 868-5600

May 13, 1977

Mr. Louis Picchi
TEAMSTERS LOCAL #51
2740 Trumbull Ave.
Detroit, Michigan 48201

RE: Loss of Turned-in Envelope, March 5, 1976
T. Pakledinaz

In view of the confusing complex items surrounding the disappearance of Mr. Pakledinaz's cash turn-in of March 5, 1976, the Company is forced to take a position counter to our established past practice. While maintaining that a Sales Representative cannot, under any circumstances, waive his responsibility to properly turn in his/her daily cash receipts (properly recorded *and* deposited into a safe) careful consideration of the facts in this case appear not to warrant restitution by Mr. Pakledinaz.

It must remain understood, however, that all sales representatives MUST properly turn in daily receipts and the variance granted in this particular case shall, in no way, alter the established past practice of employees' making full restitution upon failure to properly account for their funds. The facts in this particular case are unique and it shall not be considered a precedent in any way, shape, or form.

Any future instances of failure to properly account for such funds will result in the sales representative's making full restitution.

Very truly yours,

Robert H. Heiss
General Manager
Hostess-Detroit

RHH:crm

Company Exhibit 8

AGREED BY THE UNION:

/s/ LOUIS M. PICCHI
Louis M. Picchi

/s/ T. PAKLEDINAZ
T. Pakledinaz

TO: Mr. Robert Heiss
General Manager
Hostess-Detroit

In view of the Company's reversal in not requiring me to pay them the amount of money lost in my cash envelope on or about March 5, 1976, I hereby am waiving and dropping the unfair labor charge that I filed against the Company based on the lost envelope.

I also agree that the circumstances surrounding the loss of the envelope on or about March 5, 1976, were very unique, and that this instance does not alter or modify my responsibility of making sure that all my envelopes are properly placed in the company safe nightly.

The settlement of this one situation is not to be considered as setting a precedent of relieving me, or any other Route Sales Representative, of our responsibility in properly securing our settlement envelopes.

/s/ T. J. PAKLEDINAZ
Employee

/s/ BEN McKERRIHER
Steward

/s/ LOUIS M. PICCHI
L. Picchi

Company Exhibit 8

RECOMMENDED SETTLEMENT SHEET ACKNOWLEDGEMENT

TO: ALL SALES REPRESENTATIVES, SUPERVISORS, BRANCH MANAGERS AND SALES MANAGERS

FROM: GENERAL MANAGER

Our daily and weekly Settlement Sheets constitute documents whereby each salesperson properly accounts for merchandise delivered to him (her) by the Company. It is the absolute responsibility of such salesperson to *accurately* and *honestly* complete the forms and properly report on all of his (her) sales transactions. When signed by the salesperson, they become representations of the truthfulness of all statements and numbers therein. Any falsification of matters appearing on the Settlement Sheets constitutes a criminal act and could subject the salesperson to legal sanctions.

Should *anyone* suggest or request you to falsify any matter contained in a Settlement Sheet, whether by monetary inducement, coercion or otherwise, you must report the incident immediately to the Bakery General Manager so that corrective action may be taken and you and your job may be properly protected.

Please acknowledge your understanding of the above by signing both copies — one copy is for you — the other will be placed in your personnel file.

Very truly yours,

/s/ ROBERT H. HEISS

General Manager

cc: Personnel Department

I acknowledge receipt and completely understand the above statements of policy.

/s/ THOMAS BOWKER	2-15
Signature	Date
LIVONIA	107
Branch	Route

Company Exhibit 9

APPENDIX G

Appendix G

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

BAKERY SALESMEN, DRIVERS, WAREHOUSEMEN AND HELPERS LOCAL UNION NO. 51 A/W THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA,

Plaintiff,

Civil No. 81 71232

v.

ITT CONTINENTAL BAKING COMPANY, INC., HOSTESS CAKE DIVISION,

Defendant.

AFFIDAVIT

JACK PFEIFFER, being first duly sworn, deposes and states as follows:

1. That I am a Vice-President and Director of Labor and Personnel for ITT Continental Baking Company.

2. That during the period 1963-1979, I was a Regional Labor Relations Manager for ITT Continental Baking Company, with responsibilities, *inter alia*, for the negotiation and administration of the successive collective bargaining agreements entered into between the Detroit Hostess Cake Plant of ITT Continental Baking Company and Teamsters Local 51.

3. That during the period 1963-1979, no negotiated changes were made to the grievance-arbitration clause contained in the successive collective bargaining agreements between the Detroit Hostess Cake Plant of ITT Continental Baking Company and Teamsters Local 51.

4. That during the period 1963-1979, all grievances filed by Teamsters Local 51 against the Detroit Hostess Cake Plant of ITT Continental Baking concerned disputes relating to the rights of the parties as they existed under the successive collective bargaining agreements or customary practices.

5. That during the period 1963-1979, no representative of Teamsters Local 51 ever contended, either in negotiations or in grievance meetings, that the grievance-arbitration clause of their successive collective bargaining agreements with the Detroit Hostess Cake Plant of ITT Continental Baking Company provided for interest arbitration; i.e., arbitration wherein the arbitrator is empowered to decide questions of policy relating to what the terms and conditions of employment should be. Questions of policy relating to what the terms and conditions of employment should be were, instead, decided during the negotiations leading to each successive collective bargaining agreement.

6. That during the period 1963-1979, no grievances were filed by Teamsters Local 51 alleging that an Arbitrator had the power, under the grievance-arbitration clause of the successive collective bargaining agreements between Teamsters Local 51 and the Detroit Hostess Cake Plant of ITT Continental Baking, to engage in interest arbitration.

Further, affiant sayeth not.

/s/ JACK PFEIFFER

JACK PFEIFFER

Subscribed and sworn to
before me this 6th
day of July, 1981

/s/ CARY G. SCHMIEDEL

NOTARY PUBLIC

CARY G. SCHMIEDEL
Notary Public State of New York
No. 4304230
Certified in Westchester County
Commission Expires March 30, 1982

82-1671

No. 83-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

ITT CONTINENTAL BAKING CO., INC.,
HOSTESS CAKE DIVISION,

Petitioner,

vs.

BAKERY SALESMEN, DRIVERS,
WAREHOUSEMEN and HELPERS,
LOCAL UNION NO. 51,
affiliated with the
INTERNATIONAL BROTHERHOOD
OF TEAMSTERS, CHAUFFEURS,
WAREHOUSEMEN AND HELPERS
OF AMERICA,

Respondent.

SUPPLEMENTAL APPENDIX

GREGORY J. SCHROEDTER
(Counsel of record)
ROCKFORD R. CHRASTIL
SARA M. GREEN
BELL, BOYD & LLOYD
Three First National Plaza
70 West Madison Street,
Suite 3200
Chicago, Illinois 60602
(312) 372-1121
Attorneys for Petitioner

Dated: April 6, 1983

Merrill/Gunthorp Warren, Chicago • 372-2600

SUPPLEMENTAL APPENDIX

LISTING OF PARENT COMPANIES AND SUBSIDIARIES

Petitioner ITT Continental Baking Co., Inc., Hostess Cake Division, is a wholly owned subsidiary of its parent, ITT Holdings Inc. ITT Holdings Inc. is a wholly owned subsidiary of its parent, International Telephone & Telegraph Corporation.

Petitioner ITT Continental Baking Co., Inc. holds a 49% interest in Continental de Alimentos; a 49% interest in Wonder del Centro S.A. de C.I. Mexico; and a 30% interest in National Continental Corporation, Ltd.

International Telephone & Telegraph Corporation engages directly and through subsidiaries in various lines of commerce in the United States and in other countries. There is no connection between petitioner and ITT's other subsidiaries apart from common ownership.

No. 82-1671

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

ITT CONTINENTAL BAKING CO., INC.
HOSTESS CAKE DIVISION,
Petitioner,

vs.

BAKERY SALESMEN, DRIVERS, WAREHOUSEMEN AND HELPERS, a/w INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

GERRY M. MILLER*
FREDERICK PERILLO
GOLDBERG, PREVIANT, UELMEN,
GRATZ, MILLER & BRUEGGEMAN S.C.
788 N. Jefferson Street
PO Box 92099
Milwaukee, Wisconsin 53202
414-271-4500
Attorneys for Respondent

* Counsel of Record

St. Louis Law Printing Co., Inc., 411 No. Tenth Street 63101 314-231-4477

QUESTION PRESENTED

Is a dispute over a unilaterally established work rule arbitrable under a collective bargaining agreement with no management rights clause, no substantive language covering the matter in dispute, a broad no-strike commitment and a promise to arbitrate "any charge of violation of this agreement, charge of discrimination, grievance or dispute"?

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No. 82-1671

IN THE

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STATEMENT OF THE CASE

The sole issue in this case, as the court of appeals correctly discerned, is whether a dispute concerning a long-standing company policy comes within an arbitration clause covering "any charge of violation of this agreement, charge of discrimination, grievance or dispute". App. A-1—A-2. Clearly *not* at issue, as petitioner suggests, is whether a multiemployer agreement permits a party to refrain purposefully from bargaining in order to have an arbitrator set terms and conditions of employment. There are no new or complex issues of federal law presented here, but only the application of this Court's well-established rules for determining the arbitrability of labor disputes under a broad arbitration clause in a particular collective bargaining agreement.

Respondent Bakery Salesmen, Drivers, Warehousemen and Helpers Local Union No. 51, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Local 51), commenced this action in the United States District Court for the Eastern District of Michigan under § 301 of the Labor Management Relations Act, 29 U.S.C. § 185, to enforce an arbitration award issued under a collective bargaining agreement with petitioner ITT Continental Baking Co., Inc., Hostess Cake Division (Company). The district court held the dispute was not within the scope of the arbitration clause and therefore denied enforcement. Local 51 appealed to the United States Court of Appeals for the Sixth Circuit, which unanimously reversed the district court's holding on arbitrability and remanded the case for further proceedings consistent with its opinion. The court of appeals also denied the Company's petition for rehearing.

The underlying grievance concerned the Company's "check-in" procedure. Local 51 represents approximately 100 of the Company's driver-sales employees in the Detroit metropolitan area. Some customers pay the driver by check or in cash, and the drivers must turn in and account for these collections to the Company at the daily "check-in". He must prepare a settlement sheet recording his daily receipts of money and checks, which he then puts in an envelope. After signing, sealing, and dating the envelope, he drops the envelope into a chute leading to a metal safe. He receives no receipt or other verification that he has in fact enclosed the money and checks shown on the settlement sheet in the envelope.

Thereafter the driver has no control over what happens to the envelope. Different employees of the Company open the safe and put the envelopes in bags, which are taken by an armored car service to a bank. Days later perhaps, bank tellers open the envelopes and record the deposit totals for individual drivers, noting any discrepancy between the amounts listed on the

envelope and the actual contents. The drivers are charged or credited for these shortages or overages, regardless of amount or fault. If a driver fails to pay a shortage he is suspended.

Although this procedure was unilaterally established by management, it has existed for many years. App. E-2. Recently, however, Local 51 members had sought to change aspects of it through NLRB proceedings and an increasing number of grievances. The occasion for these challenges was that, increasingly, the Company's drivers were being charged for shortages which were caused by theft committed by other Company employees (not driver-salesmen) or through the negligence of bank employees. Thus driver Tom Bowker was required to pay a $400.00 cash shortage that turned out to be the bank's fault. In another case the Company forced driver Tom Pakledinaz to pay a $600 shortage that appears to have resulted from theft of his envelope by a supervisor. After that, Local 51's secretary-treasurer filed a policy grievance on behalf of all driver-salesmen protesting the Company's refusal to provide the drivers with a receipt or other verification for the money and checks that they turn in during the check-in procedure. App. E-7.

Arbitrator Harry J. Dworkin heard and decided the dispute. He found that no express contract language covered the check-in procedure and that the subject had never been discussed in negotiations. The Company argued to the arbitrator that all aspects of the check-in procedure, by reason of its longevity, had become a binding past practice tantamount to a contractual term. The arbitrator, however, ruled that the dispute "relat[ed] to terms and conditions of employment not covered by the Agreement, and therefore, constitutes an arbitrable issue", App. E-9.[1] He then resolved the dispute on its merits, holding

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[1] It was in this context that he observed that the grievance, which did not charge the Company with a violation of any provision of the contract, was "in the nature of an 'interest' dispute." *Id.*

that the drivers' request for a receipt to verify they had in fact deposited into their envelopes the money and checks they listed on the settlement sheet was "fair, reasonable and practical". App. E-16.[2]

The district judge, in refusing to enforce the award, stated:

> "We believe that the interpretation given to the arbitration clause is simply not reasonable. Although the language in the arbitration clause may be ambiguous we do not believe it can be reasonably interpreted to allow such 'interest' arbitration. The arbitrator's interpretation is such an extraordinary encroachment on the powers of management that to imply such a meaning more specific language is necessary to support it." App. B-6

The court of appeals reversed, stating:

> "The District Court's view would turn the Supreme Court's rules of construction upside down because it would exclude from arbitration all disputes concerning company policies, procedures, and working conditions not covered by some express term of the agreement. The *Steelworkers Trilogy* clearly contemplates arbitration of disputes not covered by the express terms of the agreement, including disputes covering company policies, procedures and working conditions." App. A-7.

The court of appeals then discussed the *Trilogy's* rules of construction in determining the arbitrability of labor disputes, App. A-6—A-7, and decided that the instant grievance was arbitrable.

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[2] The arbitrator retained limited jurisdiction for six months to provide a "reasonable trial period" for the changes he ordered so that the award would remain in effect or be modified "subject to review on the basis of experience."

REASONS FOR DENYING THE WRIT

Summary of Argument

One fundamental flaw runs throughout the Company's arguments: it silently assumes that the arbitrator made a factual finding that its check-in procedure work rules constituted a past practice equivalent to a binding contractual term, and then deliberately engaged in "interest" arbitration by altering that contractual term. The district court accepted this mischaracterization of the award in this case; the court of appeals rejected it. The court of appeals agreed with Local 51 and the arbitrator that the dispute below was an ordinary "rights" arbitration over a work rule "relating to terms and conditions of employment *not* covered by the contract", App. E-9 (emphasis added). Therefore, consonant with *United Steelworkers* v. *American Mfg. Co.*, 363 U.S. 564 (1960) and *United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960), the dispute was arbitrable. The arbitrator did *not* find, as the Company had urged, that the challenged aspect of the check-in procedure had become part of the contract. Once this is realized, petitioner's entire argument collapses.

In addition, the Company presents a variety of arguments suggesting that the decision below violates the National Labor Relations Act in various ways. All of these arguments are specious attempts to add new dimensions to a garden-variety work-rules grievance contrary to the *Trilogy*. Equally important, none of these arguments were raised or briefed before the arbitrator, in the district court, or in the court of appeals until, as an afterthought, in the petition for rehearing. They are, therefore, outside the parameters of considerations for granting a petition for certiorari, Sup. Ct. R. 17.

I. The Grievance Below Was Arbitrable And The Resultant Arbitration Award Enforceable.

No novel or important issue of federal law is presented by this case. The basic principles governing the arbitrability of disputes arising under collective bargaining agreements were clearly enunciated over 20 years ago in the celebrated *Steelworkers Trilogy*.[3] Since that time, this Court has seldom had reason to return to the issues of arbitrability resolved in the *Trilogy*, but in every such instance has emphasized the strong presumption in favor of the arbitrability of such disputes. *E.g.*, *Gateway Coal* v. *United Mine Workers*, 414 U.S. 368 (1974); *Int'l Union of Operating Engineers Local 150* v. *Flair Builders, Inc.*, 406 U.S. 487 (1972). The courts of appeals have for the most part faithfully enforced this presumption.[4]

In this case, the district judge refused to enforce an arbitration award on the grounds that the underlying dispute was nonarbitrable. It is unclear whether the district court did so because it erroneously believed that the arbitrator had engaged in "interest" arbitration, or because it felt that arbitrations over disputes not covered by express contract language trenched too deeply on management prerogative, or both. In so doing, however, the district judge ignored the *Trilogy* presumption of arbitrability and instead dispensed his own brand of industrial justice. He determined that disputes not covered by express contract language were not arbitrable unless specifically included by the words of the arbitration clause of the agreement, i.e., exactly the opposite of the *Trilogy's* rule that disputes are arbitrable unless specifically excluded from the arbitration provisions. App. B-6.

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[3] *United Steelworkers* v. *American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers* v. *Enterprise Wheel & Car Corp.*, 383 U.S. 593 (1960).

[4] *See* Morris, "Twenty Years of Trilogy: A Celebration", in *Decisional Thinking of Arbitrators and Judges, Proceedings of the Thirty-Third Annual Meeting, National Academy of Arbitrators* 331 (1981).

The Court of Appeals for the Sixth Circuit reversed the district court, correctly applying the *American Mfg.* and *Warrior & Gulf* presumptions in a case where, as here, a broad arbitration clause is the *quid pro quo* for a broad no-strike agreement: "Doubts should be resolved in favor of coverage". 363 U.S. at 582.

The court of appeals applied the *Trilogy* rules correctly. It considered, *inter alia,* the breadth of the no-strike clause, the breadth of the arbitration clause, and the lack of express exclusionary language elsewhere in the agreement. Contrary to the Company's contention, the court of appeals did not replace the *Trilogy* with a new and different eight-part test applicable only to multi-employer collective bargaining agreements. Instead, the court correctly pointed out that the *Trilogy* "applies with even greater force in situations involving local disputes governed by multi-employer agreements", App. A-8. The court then looked at the totality of circumstances and concluded the dispute was arbitrable. Significantly, the court of appeals did not find that *any* factor militated against a finding of substantive arbitrability in this case.

The Company's argument that the grievance raised an "interest" dispute hinges upon the erroneous assumption that the arbitrator *changed* or fashioned a *new* term in the parties' argeement rather than simply resolving a dispute over an omitted case[5] or the reasonableness of a work rule not covered by the

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[5] "Rights" disputes relate "either to the meaning or proper application of a particular provision with reference to a specific situation or to an omitted case." *Elgin, J. & E. Ry. Co.* v. *Burley,* 325 U.S. 711 (1945). Labor arbitrators properly and routinely perform gap-filling functions. *Warrior & Gulf, supra,* 353 U.S. at 580-581; *Gateway Coal, supra,* 414 U.S. at 378.

contract.[6] But the Company's contention that the arbitrator changed the contract rests upon its argument that all aspects of the check-in procedure, because of their longevity, had become an implied term of the contract, a point it argued vigorously to the arbitrator and in the courts below. However, the arbitrator, who must be the exclusive judge of such matters, did *not* find that the check-in procedure was a past practice that had become part of the agreement and instead determined that the dispute "relat[ed] to terms and conditions of employment not covered by the Agreement, and, therefore, constitutes an arbitrable issue." The Company's alternate contention, that the award impermissibly added terms to the agreement because they lack support in either practice or substantive contract language, negates traditional and entirely proper functions of the labor arbitrator in "rights" disputes. Underlying both contentions is the Company's effort to build a fortress upon the equivocal phrase "in the nature of an interest dispute" which appears at one point in the lengthy opinion.

The flaws in the Company's approach are apparent. If the Court overturns the arbitrator's decision on whether a binding past practice existed, the Court will contravene its own *Enterprise Wheel* holding that the merits of an award are not to be reviewed by the courts. 363 U.S. at 596. Whether a practice of some longevity has become contractually secured goes to the heart of the "rights" arbitrator's function to interpret and apply

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[6] Conventional "rights" arbitration law permits union challenges to plant rules through the grievance and arbitration procedure on the ground that they are "unfair, arbitrary, or discriminatory. *** Rules promulgated unilaterally by the employer may be challenged when established — the union need not delay its challenge until employees have been disciplined for violation of the rules. ***Plant rules must be reasonable not only in their content but also in their application." Elkouri & Elkouri, *How Aribtration Works*, 518-519 (3d Ed. 1973).

the collective bargaining agreement.[7] On the other hand, if the Court holds a grievance not arbitrable because it would cause a change in one of the Company's practices without substantive contract language to support it, the Court will have contravened its *Warrior & Gulf* holding, namely:

> "Apart from matters that the parties specifically exclude, all of the questions on which the parties disagree must therefore come within the scope of the grievance and arbitration provisions of the collective agreement." 363 U.S. at 581.

To hold, with the Company, that an arbitrator's source of law is confined to contract language or past practice and that he changes the agreement if he uses other criteria for judgment under a broad arbitration clause, would reverse another *Warrior & Gulf* holding.[8] And if the Court reads the award to mean, because the arbitrator said the grievance raised something of an "interest" dispute, that he had indeed found a binding past practice or was otherwise making a new agreement for the parties, the Court will overrule still another *Enterprise Wheel* holding, namely: "A mere ambiguity in the opinion accompa-

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[7] "[T]he mere existence of a practice, without more, has no real significance. Only if the practice clarifies an imperfectly expressed contractual obligation or lends substance to an indefinitely expressed obligation or creates a completely independent obligation will it have some effect on the parties' relationship." Mittenthal, *Past Practice and the Administration of Collective Bargaining Agreements*," 59 Mich. L. Rev. 1017, 1020 (1961). Practices will not be held binding without acceptability, and as the court of appeals observed, this award contained findings from which it could reasonably be concluded that in recent years the practice lost whatever acceptability it may once have had. App. A-4. "Where this acquiescence does not exist, that is, where employees constantly protest a particular course of action through complaints and grievances, it is doubtful that any practice will be created." *Id.*, at 1017.

nying an award, which permits the inference that the arbitrator may have exceeded his authority, is not a reason for refusing to enforce the award", 363 U.S. at 598.[9]

In short, although presented in the guise of a post-award challenge to the arbitrability of an alleged "interest" dispute, the Company's argument in this case boils down to an old and familiar phenomenon: the Company is dissatisfied because it lost before the arbitrator. It now wishes to relitigate the merits of a garden-variety work rule controversy to the top of the federal court system.

If the Court were to grant this petition and reverse the court of appeals, it would in effect be overruling the *Steelworkers Trilogy* and reviving the defunct *Cutler-Hammer* doctrine.[10] It will be an invitation to the lower courts to engage in plenary review of the merits of arbitration awards, under the guise of determining whether or not they are non-arbitrable "interest" awards, vacating or enforcing the awards based upon the in-

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[8] "The labor arbitrator is usually chosen because of the parties' confidence in his knowledge of the common law of the shop and their trust in his personal judgment to bring to bear considerations which are not expressed in the contract as criteria for judgment. The parties expect that his judgment of a particular grievance will reflect not only what the contract says but, insofar as the collective bargaining agreement permits, such factors as the effect upon productivity..., its consequence to the morale of the shop, [and] his judgment whether tensions will be heightened or diminished." 363 U.S. at 582.

[9] Read in context and in accordance with a presumption of validity, the statement appears to mean nothing more than that the dispute is not covered by any express language in the contract.

[10] *Machinists* v. *Cutler-Hammer, Inc.*, 271 App. Div. 917, *aff'd* 297 N.Y. 519 (1947).

dividual judge's rendition of the contract's meaning, the industrial common law, and past practice. More importantly, it will be an invitation for disgruntled parties to bring to the federal courts precisely the type of minor disputes that this as most collective baragaining agreements mandate be resolved by an arbitrator's award which "shall be *final and binding* upon both parties hereto", App. F-23 (emphasis added).

II. The Decision Below Invades Neither The Statutory Duty To Maintain Agreements In Effect Nor The Obligation To Bargain Collectively; In Fact It Promotes Both.

The Company's contentions that the arbitrator invaded the federal labor statute by encroaching upon its "statutory right to resolve local issues through the process of collective bargaining" (Pet. 17-18) or forcing a "mid-term contract change" upon it (Pet. 9) reflect fundamental misconceptions of the nature of a collective bargaining agreement. Indeed they continue to turn the *Trilogy* upside down.

The collective bargaining and arbitration processes are *not* mutually exclusive or antithetical.

> "[A]rbitration of labor disputes under collective bargaining agreements is part and parcel of the collective bargaining process itself. *** The grievance procedure is...a part of the continuous collective bargaining process. It, rather than a strike, is the terminal point of a disagreement."[11]

The collective bargaining agreement does *not* fix all employment terms with specificity; arbitration is the means agreed upon to resolve many of them; and in fact arbitration is the statutorily preferred means for resolving such disputes under

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[11] *Warrior & Gulf, supra,* 363 U.S. at 578, 581; *NLRB* v. *Acme Industrial Co.,* 385 U.S. 432, 437, n. 3 (1967).

collective baragaining agreements. 29 U.S.C. § 173(d).[12] Therefore, in deciding whether arbitration will be compelled or an award enforced, the judicial inquiry under *Warrior & Gulf* has nothing to do with whether the parties could or should have settled the dispute at the collective bargaining table.

> "[T]he judicial inquiry under § 301 must be *strictly confined* to the question whether the reluctant party did *agree to arbitrate* the grievance or *did agree* to give the arbitrator power to make the award he made."
>
> 363 U.S. at 581 (emphasis added).

Nothing in this Court's prior decisions or federal labor policy supports the notion that a mandatory subject of bargaining, if not negotiated, cannot be arbitrated.

Of course, terms actually negotiated and agreed to at the bargaining table cannot be set aside by an arbitrator;[13] but as to matters not covered by the contract, the "processing of disputes through the grievance procedure is actually a vehicle by which meaning and content are given to the collective bargaining agreement", *id.* Thus the contention that an award under a

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[12] "Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement."

[13] Section 8(d) of the Labor Management Relations Act, 29 U.S.C. § 158(d), requires in pertinent part that the parties "continue...in full force and effect, without resorting to strike or lockout, all the terms and conditions of the existing contract...until the expiration date of such contract..." and lifts the duty to bargain with respect to "any modification of the terms and conditions contained in a contract..., if such modification is to become effective before" the reopening date of the contract.

broad arbitration clause resolving a dispute not covered by the agreement will force a mid-term contract change not only is at war with the *Trilogy* but a patent contradiction in terms as well.[14]

The Company's contention also cuts deeply into the *American Manufacturing* principle that an arbitration clause is the quid pro quo for a union's no-strike commitment and if there is no exception in the no-strike clause then none should be read into the grievance clause.[15] Any incentive for a union to give up the right to strike in return for an employer's commitment to submit any dispute to arbitration is necessarily dissipated if the employer is permitted to weasel out of its arbitration promises because of an implied exception for disputes that should have been negotiated, *after* the union's hands are tied by the no-strike clause.[16] Thus the Company's contention would violate the *Gateway Coal* canon that, "[a]bsent an explicit expression of... [a contrary intention], the agreement to arbitrate and the duty not to strike should be construed as having co-terminous application", 414 U.S. at 382.

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[14] "Put most simply, the arbitrator is the parties' officially designated 'reader' of the contract. He (or she) is their joint alter ego for the purpose of striking whatever supplementary bargain is necessary to handle the anticipated unanticipated omissions of the initial agreement. Thus, a 'misinterpretation' or 'gross mistake' by the arbitrator becomes a contradiction in terms. In the absence of fraud or an overreaching of authority on the part of the arbitrator, he is speaking for the parties, and his award *is* their contract. That is what the 'final and binding' language of the arbitration clause says. In sum, the arbitrator's award should be treated as though it were a written stipulation by the parties setting forth their own definitive construction of the labor contract." St. Antoine, *Judicial Review of Labor Arbitration Awards: A Second Look At Enterprise Wheel And Its Progeny*, 75 Mich. L. Rev. 137, 140 (1977).

[15] 363 U.S. at 567. *See, also Boy's Markets* v. *Retail Clerks Union*, 398 U.S. 235, 248 (1970).

[16] *Cf. Boys Markets*, 398 U.S. at 248.

In short, assuming without conceding that these Company contentions have been properly raised,[17] they present no new or important issues warranting review by this Court. Stripped of overblown rhetoric they, too, are bottomed on the fallacy that this Court sits to substitute its judgment for the arbitrator's as to whether the Company's evidence proved a past practice binding upon the union or, put somewhat differently, as to whether the arbitrator was factually correct in holding the dispute not covered by the contract. Nothing in the opinion below supports the Company's apocalyptic concern for the future of multi-employer bargaining absent review here. The court of appeals merely applied established *Trilogy* criteria to the circumstances of these parties, their contract and this dispute, without ruling that a different result would obtain if only single-employer bargaining were involved. It is true, as is frequently the case, that this dispute might have been settled at the bargaining table, just as it is true that the Company might have narrowed the arbitration clause at the bargaining table. That neither happened is no cause for depriving Local 51 of the benefit of its bargain nor for review of this case by this Court.

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[17] The arguments under discussion were *not* addressed in the opinions below because the Company did not raise them until it petitioned for rehearing in the court of appeals. Therefore this Court should not consider them as properly raised in the petition. "We do not ordinarily address for the first time in this Court an issue which the Court of Appeals has not addressed. ***" *J. Truett Payne Co.* v. *Chrysler Motors Co.*, 451 U.S. 557, 568 (1981).

CONCLUSION

The petition for certiorari should be denied.

GERRY M. MILLER
FREDERICK PERILLO
Goldberg, Previant, Uelmen,
Gratz, Miller & Brueggeman s.c.
788 N. Jefferson Street
PO Box 92099
Milwaukee, Wisconsin 53202
414-271-4500

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OCTOBER TERM, 1982

ITT CONTINENTAL BAKING CO., INC.,
HOSTESS CAKE DIVISION

Petitioner,

v.

BAKERY SALESMEN, DRIVERS, WAREHOUSEMEN AND HELPERS, LOCAL UNION NO. 51, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF THE AMERICAN BAKERS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

KENNETH F. HICKEY
HARRY A. RISSETTO *
1800 M Street, N.W.
Washington, D.C. 20036
Attorneys for Amicus Curiae
The American Bakers Association

Of Counsel:
MORGAN, LEWIS & BOCKIUS
May 11, 1983

* COUNSEL OF RECORD

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

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STATEMENT OF INTEREST[1]

The American Bakers Association (hereinafter "ABA") is a trade association whose 250 members produce approximately 80% of the baked food products consumed in the United States. The ABA is comprised of large nationwide companies, regional bakers, and independent local baking companies. The members of the Association negotiate numerous multi-employer collective bargaining[2] agreements with various labor organizations representing their employees. The ABA, through its Industrial Relations Committee, collects and disseminates industry-wide collective bargaining data, participates in a productivity project with the American Productivity Center and engages in a variety of consultive functions in connection with the negotiation and administration of collective bargaining agreements in the baking industry. In many instances, the ABA has represented the baking industry before federal agencies and Congressional committees on issues applicable to a major portion of the industry. ITT Continental Baking Company, Inc. (hereinafter "ITT Continental"), is a member of the American Bakers Association.

The ABA is concerned that the decision of the Court of Appeals will destabilize labor relations in that substantial portion of the industry with a tradition of multi-employer

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[1] The American Bakers Association amicus brief is submitted with consent of the parties. Communications permitting this brief have been filed with the Clerk of the Court.

[2] The term "multi-employer collective bargaining" is used generically in this context to include "coordinated" or "coalition" bargaining where employers bargain together but individually execute the resulting collective bargaining agreement, as well as true multi-employer bargaining where employers negotiate as part of a single collective bargaining unit and sign a single agreement.

bargaining. By permitting arbitrators to routinely formulate and design, for individual companies, new terms and conditions of employment on "local issues" through unconsented interest arbitration, the Court of Appeals decision will discourage continued participation in multi-employer bargaining. The prospect of such a development is of concern to the ABA because of its adverse impact on industry labor relations stability.

REASONS FOR GRANTING THE WRIT

I. The Decision Of The Court Of Appeals Will Destabilize Labor Relations In Industries With A Tradition Of Multi-Employer Bargaining

The Petition for a Writ of Certiorari should be granted because the deicision of the Court of Appeals will create serious disincentives to continued participation in multi-employer collective bargaining relationships.

In a number of industries, including the baking industry, groups of employers and the union or unions representing their employees have agreed to participate in multi-employer or coordinated collective bargaining in order to meet their bargaining obligations under the National Labor Relations Act.[3] In a 1980 survey of major collective bargaining agreements (those covering 1,000 or more employees), it was determined that 40% were multi-employer agreements and that over 43% of the organized

[3] Under the National Labor Relations Act (hereinafter "NLRA"), 29 U.S.C. § 151 *et seq.* (1976), when a labor orgnization is certified or recognized as the collective bargaining representative of a group of employees, the employer has an obligation to engage in collective bargaining negotiations in order to reach an agreement with the union.

work force was covered by multi-employer collective bargaining agreements.[4]

The multi-employer bargaining structure varies greatly. It may consist of a group of local, regional or national employers bargaining together, or through an association that represents the group as a single bargaining unit. It can be highly organized, or amount to no more than a loose federation of employers who bargain as an informal group or simply through an agreed-upon spokesman.

Multi-employer bargaining in the baking industry exists in two ways. With regard to production workers, multi-employer agreements are negotiated on a regional pattern-setting basis covering a major portion of the country. These agreements bind the employers that are part of the multi-employer group and also set the pattern for individual employer negotiations that usually follow the pattern. With regard to non-production workers, multi-employer agreements are negotiated on a local area basis involving the companies which are dominant in that geographical location. Again, these patterns exercise an influence over later agreements negotiated in nearby geographic areas. The net result is that the industry as a whole is influenced and led by the terms and conditions of multi-employer agreements.

Multi-employer bargaining exists on a national scale in many other industries, such as railroad, coal, steel and trucking. In those industries, agreements are negotiated covering thousands of workers and involving millions of

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[4] Bureau of Labor Statistics, U.S. Department of Labor, Bull. No. 2095, *Characteristics of Major Collective Bargaining Agreements—January 1, 1980,* at p. 19, Table 1.8 (1981).

dollars. Further, in the construction and service industries, it is very common for small employers to join together in bargaining with the union or unions representing their employees.

Considering the wide proliferation of multi-employer agreements, it is no wonder that the Court has noted that:

> [B]y permitting the union and employers to concentrate their bargaining resources on the negotiation of a single contract, multi-employer bargaining enhances the efficiency and effectiveness of the collective bargaining process and thereby reduces industrial strife.

Charles D. Bonanno Linen Services v. *NLRB*, 454 U.S. 404, 409 n.3 (1982).

The Court should grant the Petition because the decision of the Court of Appeals will have a chilling effect on the willingness of employers to engage in multi-employer collective bargaining. The Court of Appeals decision endorses an arbitrator's interest arbitration award even though the parties never agreed to an interest arbitration procedure in the collective bargaining agreement. The decision rationalizes this result on the basis that the parties' multi-employer bargaining structure purportedly could not address so-called local disputes at the table. We submit that rather than having multi-employer labor agreements misinterpreted as delegating the establishment or modification of terms and conditions of employment to an arbitrator, the parties will be inclined to dissolve the consensual multi-employer collective bargaining relationships and revert to single employer-union collective bargaining.

This basic alteration in traditional collective bargaining structures will have an inherently destabilizing effect on labor management relations in this industry. The

proliferation of individual collective bargaining negotiations will complicate labor relations and likely increase the number of strikes and lockouts. The destablization of multi-employer bargaining is directly contrary to national labor policy. The National Labor Relations Board has expressly stated that national labor policy requires the preservation of multi-employer bargaining patterns, *Retail Associates*, 120 NLRB 388, 393-5 (1958), and this Court has deferred to the Board's expertise in protecting multi-employer bargaining. *NLRB* v. *Truck Drivers Local Union No. 449*, 353 U.S. 87, 93-6 (1957); *Charles D. Bonanno Linen Services* v. *NLRB*, *supra*.

These pessimistic predictions concerning the impact of the Court of Appeals decision become realistic on analysis.

II. The Court Of Appeals Opinion Fundamentally Misapplies The Court's Decisions Defining The Proper Role Of Arbitration Under Federal Labor Policy

There are two generic types of labor arbitration: "rights arbitrations" in which the arbitrator resolves a dispute over the interpretation or application of a collective bargaining agreement or customary practice; and "interest arbitrations" in which the arbitrator actually formulates one or more terms and conditions of employment. *See*, F. Elkouri, HOW ARBITRATION WORKS (1973). *See also Local 344 Leather Goods Union* v. *Singer Co.*, 478 F.Supp. 441, 443 n.5 (N.D.Ill. 1979). These two forms of arbitration have fundamentally different roles in national labor policy. As Professor Elkouri states:

> Disputes as to "rights" are adjudicable under the laws or agreements on which the rights are based and are readily adaptable to settlement by arbitration. Disputes as to interests, on the other hand, involve questions of policy which, for lack of prede-

> termined standards, are not generally regarded as justiciable or arbitrable.

Elkouri, *supra* at 48.

This distinction between *rights* and *interests* arbitration is manifest in labor legislation. Section 203(d) of the National Labor Relations Act, 29 U.S.C. § 173(d) speaks to arbitration as the "desirable method for settlement of disputes *arising over the application or interpretation of an existing collective bargaining agreement.*"—a clear reference to rights arbitration.

The Railway Labor Act, 45 U.S.C. § 151, *et seq.*, which in many respects was the prototype for the National Labor Relations Act, provides for two arbitration procedures: one to resolve "rights" or "minor" disputes, 45 U.S.C. § 153, and another to resolve "interests" or "major" disputes. 45 U.S.C. § 157; *see, Elgin, J. & E. Ry. Co.* v. *Burley*, 325 U.S. 711 (1945). Most significantly, under the Railway Labor Act, use of the "rights" arbitration procedure is mandatory and "interests" arbitration is purely voluntary. *See, Brotherhood of Railroad Trainmen* v. *Chicago, R. & I.R.*, 353 U.S. 30 (1957).

The voluntary character of interest arbitration results from its extremely limited role in private sector labor management relations. Reduced to its essence, interest arbitration supplants or replaces collective bargaining as the means for establishing terms and conditions of employment. It is an extremely rare phenomenon in private sector collecive bargaining agreements. C. Morris, *The Role of Interest Arbitration in a Collective Bargaining System*, in THE FUTURE OF LABOR ARBITRATION IN AMERICA (1976).[5] Indeed, labor policy in the United States is

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[5] The Bureau of Labor Statistics, U.S. Department of Labor, Bulletin No. 1425-6, *Arbitration Procedures*, (1966), reports that "only

based on the centrality of collective bargaining as the procedure for establishing terms and conditions of employment. NLRA §§ 1, 201; 29 U.S.C. §§ 151, 171.

Obviously, an employer and a union can agree to interest arbitration, and when they do, that agreement should be effectuated. However, there is no strong labor policy favoring interest arbitration. As Elkouri says:

> Indiscriminate use of 'interests' arbitration is to be avoided, for such use may impede healthy development of the labor-management relationship. In particular, parties who abdicate to arbitrators the responsibility for writing the bulk of the collective bargaining agreement risk serious disappointment.
>
> Leaving too many 'interests' issues to be resolved by neutrals has been severely criticized by the neutrals themselves and has produced some pronounced disappointments of dispute settlement efforts.

Elkouri, *supra* at 53.

In contrast, "rights" arbitrations, involving the settlement of disputes arising over the application or interpretation of existing agreements or established practices is an integral aspect of the labor relations environment.[6]

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about two percent of major collective bargaining agreements provide for arbitration over terms of new contracts." *cited in Mechanical Contractors Ass'n*, 202 NLRB 1, 12-13 (1973).

[6] A BLS survey of collective bargaining agreements covering 1,000 or more employees reflects that 1,496 agreements out of 1,550 surveyed had grievance and arbitration procedures. Bureau of Labor Statistics, *supra* n.4. The frequency of grievance and arbitration procedures in collective bargaining agreements is consistent with § 203(d) of the NLRA as well as the mandatory "rights" grievance procedure contained in the Railway Labor Act.

The decisions of the Supreme Court in the *Steelworker Trilogy* cases,[7] upon which the Sixth Circuit relied, all relate to the desirability of "rights" arbitrations to determine disputes regarding the interpretation or application of the collective bargaining agreement.

The Court of Appeals' decision, however, does not concern a rights arbitration, but rather an interest arbitration. The Court of Appeals endorsed an arbitrator's exercise of interest arbitration jurisdiction even though there was no interest arbitration provision in the collective bargaining agreement between ITT Continental and Teamsters Local No. 51.[8] The union filed a grievance requesting the arbitrator to formulate a new collection and deposit procedure which would be operative at the Company's Detroit distribution facility. Disregarding over twenty years of past practice under the existing contract, the arbitrator concluded that he had authority to invalidate the existing procedure and draft a new one. He did this even though there was no language in the contract or in an arbitral submission agreement which authorized him to formulate new terms and conditions of employment for the parties.

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[7] *United Steelworkers of America* v. *American Manufacturing Company*, 363 U.S. 564 (1960); *United States Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); and *United Steelworkers of America* v. *Enterprise Wheel and Car Corp.*, 363 U.S. 593 (1960).

[8] There can be no dispute here that the arbitrator exercised interest arbitration jurisdiction. In his award (P. App. E-9), Arbitrator Dworkin wrote:

> The grievance is in the nature of an interest dispute and is properly before the arbitrator for determination on the merits.

We submit that the Court of Appeals has totally misapplied the Court's precedent by failing to differentiate between "rights" and "interest" arbitration. This Court has never applied the *Steelworkers Trilogy* analysis to interest arbitration, and other Circuit Courts have recognized the difficulty of attempting to do so. *See e.g., Laundry, Dry Clean & D. H. Wkrs. Int. U., Local 93* v. *Mahoney*, 491 F.2d 1029 (8th Cir. 1974) *cert. denied* 419 U.S. 825 (1975). The Sixth Circuit has improperly applied the federal labor policy favoring "rights" arbitration to a union demand for "interest" arbitration. The court held, in effect, that an arbitrator may establish or modify a term or condition of employment when established practice is challenged by a union under a general arbitration provision. There is no case law which supports such a presumption that interest arbitration is authorized by a labor agreement simply because parties negotiate collectively or in a coalition. An agreement to engage in interest arbitration should not be presumed: because of its significance as a substitute for collective bargaining, an agreement to submit a dispute to interest arbitration must be express. *See Aluminum Co. of America v. International U.*, 630 F.2d 1340 (9th Cir. 1980); *Oil, Chemical & Atomic Workers* v. *Shell Oil*, 555 F.Supp. 142 (S.D.Tex. 1982). *Contra Nashville News P.P.U., L.50* v. *Newspaper Print Corp.*, 399 F.Supp. 593 (M.D. Tenn. 1974), *aff'd* 518 F.2d 351 (6th Cir. 1975).

Moreover, a presumption that the parties to a bargaining relationship intend to establish or modify terms and conditions of employment by arbitration rather than collective bargaining is not supported by the National Labor Relations Act. Indeed, just the opposite is the case. The Act endorses collective negotiations which must be conducted in good faith. The Act does not require the parties to reach agreement, nor does it authorize an independent

agency (either the National Labor Relations Board or the Federal Mediation and Conciliation Service) to fashion an agreement against the parties' will. The Act fulfills its objective by policing the manner in which collective bargaining occurs. The parties' relative economic strength and bargaining priorities determine the results. The underlying premise of the Court of Appeals' decision, however, turns the philosophy of the NLRA "on its head." It holds that simply because the parties have bargained in a multi-employer context, the arbitrator has more authority (than he otherwise would) to resolve local disputes by formulating new terms and conditions of employment under the guise of "rights arbitration."

Our criticism of the Court of Appeals decision is not intended to suggest that the parties could not agree to "interest" arbitration and that such an agreement could not be judicially enforced. *See Winston-Salem Printing Press* v. *Piedmont Publishing Co.*, 393 F.2d 221 (4th Cir. 1968). Rather, our criticism focuses on the Court's far-reaching application of a labor policy assumption that presumes the parties have agreed to interest arbitration simply because the structure of collective negotiations occurs in a multi-employer bargaining context. The Court of Appeals' presumption is wholly inappropriate in light of consistent NLRB and court precedent holding that a collective bargaining proposal to establish or modify a term or condition of employment by interest arbitration is not a mandatory subject of bargaining over which the union can strike or the employer lock out. *See, NLRB* v. *The Columbus Printing Pressmen and Assistants' Union No. 252*, 543 F.2d 1162, 1166 (5th Cir. 1976); *Milwaukee Newspaper and Graphic Communications Union, Local No. 23* v. *Newspapers, Inc.*, 586 F.2d 19 (7th Cir. 1978) (and cases cited therein).

Interest arbitration does not enjoy a preferential status under the NLRA or other court or Board precedent. To introduce a presumption of interest arbitration into the administration of multi-employer contracts will create a signficant disincentive to continued participation in that common form of collective bargaining. An employer continually will be at risk of a union grievance, such as the one filed in this case, asking an arbitrator to modify any one of the many terms and conditions of employment that have been established by practice rather than agreement at the local level. The court's approach will substitute interest arbitration for collective bargaining and involuntarily delegate to a third-party arbitrator the task of reformulating terms and conditions of employment.

If the cost of participating in multi-employer bargaining is a presumptive expansion of the scope of a rights arbitration procedure to include disputes over the formation or modification of terms and conditions of employment, employers will be inclined to abandon multi-employer bargaining in favor of bilateral collective bargaining. As a result, the collective bargaining patterns that evolved through the years and have achieved a measure of labor relations stability in this industry will be disrupted, in conflict with national labor policy, and to the prejudice of employers, unions, employees and the public.

CONCLUSION

The Court should grant the Petition for a Writ of Certiorari in this case to reaffirm the primacy of collective bargaining in national labor policy and to correct the Court of Appeals' misapplication of the Court's important decisions in the *Steelworker Trilogy*.

Respectfully submitted,

KENNETH F. HICKEY
HARRY A. RISSETTO
1800 M Street, N.W.
Washington, D.C. 20036
Attorneys for Amicus Curiae
The American Bakers Association

Of Counsel:
MORGAN, LEWIS & BOCKIUS
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